No. 93-699

In the Supreme Court

OF THE

United States

Supreme Court, U.S.
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OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,

v.

CITY OF SAN DIEGO,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On appeal from a grant of summary judgment against petitioner in this Establishment Clause case, the Court of Appeals for the Ninth Circuit remanded for "further factual findings." The district court then held an evidentiary hearing at which it heard testimony supporting petitioner's contentions. It nonetheless reaffirmed the grant of summary judgment, rendering findings of fact against petitioner based on credibility determinations.

Despite the existence of evidence in petitioner's favor, the court of appeals affirmed the grant of summary judgment, distinguishing this case from "garden variety" summary judgment proceedings in which no evidentiary hearing has been held.

In creating this new summary judgment procedure, did the court of appeals err?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the Court of Appeals for the Ninth Circuit were petitioner and respondent. Petitioner's co-plaintiff in the district court, The Society of Separationists, Inc., did not participate on appeal.

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No. _____

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Howard T. Kreisner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit is reported at 1 F.3d 775 and appears in Appendix A at a-1 to a-66.[1] It contains the Order of the Court of Appeals for the Ninth Circuit denying a petition for

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[1] The Appendices follow the text of this Petition and are numbered starting with page a-1. All citations with the "a-" prefix refer to the Appendices.

rehearing and rejecting a suggestion for rehearing *en banc*. The Memorandum Decision and Order of the United States District Court for the Southern District of California (Judge Enright) is unreported and appears in Appendix A at a-67 to a-74. The Order of the Court of Appeals for the Ninth Circuit vacating the appeal submission and remanding to the district court (the "Remand Order") is unreported and appears in Appendix A at a-75 to a-76. An amendment to the Remand Order is unreported and appears in Appendix A at a-77. The district court's Findings of Fact and Conclusions of Law (Judge Huff) is reported at 788 F. Supp. 445 and appears in Appendix A at a-78 to a-87.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 3, 1993. (a-1.) A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1993. (a-1.) The jurisdiction of the federal courts in the first instance rested upon 28 U.S.C. § 1331. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Federal Rule of Civil Procedure 56, which appears in Appendix C at a-111.

STATEMENT OF THE CASE

Petitioner Howard T. Kreisner ("Kreisner") filed suit in 1988 alleging that the City of San Diego (the "City") violated the Establishment Clauses of the United States and California Constitutions by allowing the San Diego Community Christmas Center Committee, Inc. (the "Christmas Committee"), a nonparty, annually to place a six-week holiday display in the Organ Pavilion, an outdoor theater in the City's Balboa Park. This display depicts eight scenes from the New Testament and consists of life-size figures and backdrop paintings accompanied by signs with biblical passages in

English and Spanish. Kreisner and the City each moved for summary judgment. (a-68.) District Judge William B. Enright determined that the parties did not dispute "the essential facts" (a-68), and granted the City's motion on the ground that the City had a policy of open access to the park.

On appeal to the Court of Appeals for the Ninth Circuit, Kreisner contended that the City gave the Christmas Committee preferential treatment by allowing it to use the Organ Pavilion for its New Testament display without following the City's own written permit regulations. *Appellant's Opening Brief* at 32.

In oral argument before the court of appeals, the City for the first time alleged the existence of an unwritten, unannounced "first-come, first-served" permit policy under which it issued permits for the New Testament display. (a-50.) The court of appeals vacated the appeal submission and remanded the case to the district court "for the limited purpose of making further factual findings," specifically, to "determine what are the policies of the City ... with respect to granting permits for the use of Balboa Park." (a-75.)

Following Judge Enright's recusal, District Judge Marilyn L. Huff scheduled a hearing in response to the remand order. Prior to the hearing date, the parties agreed to discovery during the remand period. Kreisner propounded document requests and requests for admissions, and noticed depositions. Despite its earlier agreement, the City refused to respond to Kreisner's discovery requests. On motion of the City, Judge Huff foreclosed discovery. *See* a-92.

At the outset of the remand hearing, the district court expressed uncertainty regarding the hearing's purpose:

> *The Court*: ... Then it's a little unusual in that the previous matter was submitted as cross-motions for summary judgment in which both of the parties had said there was no material

> issue of fact and the appellate court has then remanded for a limited purpose of the Court making further factual findings on a motion for summary judgment where generally the Court does not make factual findings.
>
> Are the parties in agreement that we are having an evidentiary hearing that could be considered a trial of this proceeding?

(a-90; *see also* a-91.)

Both the City and Kreisner objected on the record[2] to the notion that the hearing constituted a trial:

> *Ms. Castleman [for the City]*: No, that truly isn't my understanding. It's my understanding from reading the transcript that there were some representations made by Ms. Jackson concerning the permit system in the park, and the Court felt — the Ninth Circuit felt that perhaps there wasn't the documentation previously — or that the District Court had not addressed that documentation in order to make findings on the permit system, and that the Court felt it needed to have those findings in order to either affirm or reverse the summary judgment.
>
> *The Court*: And what's your understanding of the procedural vehicle that we would be using today?
>
> *Mr. Jacobs [for Kreisner]*: ... I'm not exactly sure that there is a place in the rules for this sort of proceeding, and I would want to preserve on —

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[2] The court of appeals is simply wrong, therefore, when it states that "Kreisner did not object to ... the holding of an evidentiary hearing...." (a-8 n.3.)

> for the record — the view that, *in fact, there are factual disputes — in fact, a trial on the merits is required, and that this quasi-summary judgment, quasi-fact-finding inquiry is irregular.*

(a-90 (emphasis added).)

Kreisner also objected at the outset of the hearing to the ban on discovery, noting that additional fact development was needed to determine whether summary judgment was appropriate:

> *Mr. Jacobs*: As you [the district court] noted, this case is on appeal of cross-motions for summary judgment, and one way of proceeding would be to further develop the factual record through the usual proceedings that anticipate a motion for summary judgment and determining through that process whether there are disputed issues of material fact.
>
> That, coupled with the fact that the city holds all the relevant information concerning its policies and practices, led us to feel quite strongly that discovery was necessary in order to create a record sufficient to determine whether summary judgment was still appropriate in this case, and so we have a continuing concern about the absence of discovery and would like to reiterate that today, I suppose, but also put it on the record.

(a-92.)

At the hearing, witnesses offered conflicting testimony about the City's policies on use of the park, and of the Organ Pavilion in particular. City employees Penny Scott and Jack Krasovich testified that the City issues use permits for the Organ Pavilion pursuant to an unwritten, unannounced "first-

come, first-served" policy. According to the City's evidence, applications for use of the Organ Pavilion must be made no earlier than one year in advance.

Kreisner, however, presented evidence that the American Civil Liberties Union (the "ACLU") applied on April 4, 1991, to use the Organ Pavilion during the 1991 holiday season, only to have its application rejected in favor of a subsequent request made five months later by the Christmas Committee. Janet Bergo, an ACLU employee, testified that upon submitting the ACLU's first-in-time permit application, she was informed by the City that it would allow the Christmas Committee (which had not at that time applied for a 1991 permit) to use the Organ Pavilion every year and that the display is "always there" during the holiday season. (a-101.)

Expressly relying on credibility determinations, the district court rejected Kreisner's evidence and found that the City issued permits for the Organ Pavilion on a first-come, first-served basis. In particular, the court found City employee Penny Scott to be "a credible witness after listening to her testimony and observing her demeanor." (a-81.) The district court also found City employee Jack Krasovich to be "a credible witness and accept[ed] his testimony regarding the City's [permit] policy as true."[3] (a-81.)

The district court entered additional findings of fact and "reaffirm[ed]" the grant of summary judgment. (a-87.) Applying a "clearly erroneous" standard to the district court's findings of fact (a-8 n.3), the court of appeals affirmed

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[3] The district court's findings contain other references to the credibility of the witnesses. *See, e.g.*, a-84 (Finding No. 7) ("After considering all of the evidence and observing the demeanor of the witnesses, the court concludes that the ACLU simply desired to test the City's policy without taking adequate steps to arrange for the construction of a major display or to follow up on its inadequate request for a permit."). In this particular instance, in fact, the uncontroverted testimony of ACLU employee Betty Wheeler demonstrated that the organization would have constructed the display had it received the permit. *See* a-105 to a-109.

summary judgment for the City. With one judge dissenting, the Ninth Circuit panel found that traditional summary judgment rules did not apply because the case was "far different" from "garden variety summary judgment cases." (a-8 n.3.)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The court of appeals' decision creates an unprecedented exception to Federal Rule of Civil Procedure 56. Indeed, the court of appeals defined an entirely new summary judgment procedure — a "non-garden variety" summary judgment proceeding — to which traditional summary judgment principles do not apply. In so doing, the court violated precedent established by this Court and created tremendous opportunities for confusion in the lower courts.[4]

By sanctioning a radical departure from well-established summary judgment jurisprudence, the court of appeals' decision is inconsistent with decisions of other courts of appeals. Moreover, the court of appeals' decision dramatically departs from the accepted and usual course of judicial proceedings. For these reasons, this Court should exercise its power of supervision by granting the writ.

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[4] The harm from the district court's procedure is clear in this case: the serious constitutional questions that are apparent in the court of appeals decision have been obscured by procedural irregularities. Establishment Clause cases such as this one require fact-intensive analyses. *See, e.g., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (Blackmun, J., joined by Steven, J.); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). In petitioner's view, the state of the record here is such that review of the court of appeals decision on the merits is foreclosed.

I. TRADITIONAL SUMMARY JUDGMENT RULES APPLY WHEN A COURT RELIES ON ORAL TESTIMONY IN DECIDING A SUMMARY JUDGMENT MOTION

Time and time again, this Court has noted that fact disputes are not to be resolved on summary judgment. When there are genuine factual disputes that reasonably could be resolved in favor of the nonmovant, summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also Rankin v. McPherson*, 483 U.S. 378, 382 n.6 (1987); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Board of Education v. Pico*, 457 U.S. 853, 863 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 & n.26 (1982); *Bishop v. Wood*, 426 U.S. 341, 347 & n.11 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 139-40 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970).

The district court's procedure on remand defied this long-standing jurisprudence. After resolving factual disputes based on its own explicit credibility determinations, the district court "reaffirm[ed]" the grant of the City's summary judgment motion. (a-87.) The district court simply dismissed the testimony of Kreisner's ACLU witnesses,[5] and failed to draw inferences favoring Kreisner, the nonmovant.

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[5] Under certain circumstances, a judge might be able to determine on summary judgment that evidence is incredible as a matter of law. The district court, however, made no such finding, nor does the ACLU's testimony bear the indicia that support such a finding. *See, e.g., Johnson v. Washington Metropolitan Area Transit Authority*, 883 F.2d 125, 128 (D.C. Cir. 1989) ("The removal of a factual question from the jury is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence, and undermined either by other credible evidence, physical impossibility or other persuasive evidence that the plaintiff has deliberately committed perjury."), *cert. denied*, 494 U.S. 1027 (1990); *Stewart v. RCA Corp.*, 790 F.2d 624, 628 (7th Cir. 1986) ("A court might be able to find a witness incredible as a matter of law if he had told a different story under oath before recognizing the legal significance of the truth, or if the current story were irrefutably contradicted by documentary evidence.").

As Judge Boochever noted in his dissent in the court of appeals, when Kreisner's evidence is construed in the light most favorable to him, it shows that "San Diego reserved the Organ Pavilion for the Christmas Committee display despite the ACLU's first-in-time application...." (a-53.) Such a finding, of course, would easily defeat the City's summary judgment motion. Thus, by adopting its unprecedented procedure, the district court transformed what should have been a decision that summary judgment was inappropriate into a ruling in favor of the City.

The court of appeals acknowledged its significant departures from traditional summary judgment law, but attempted to justify them on the basis that the district court had conducted an evidentiary hearing.[6] Even assuming that the district court was entitled to take testimonial evidence at a hearing, it certainly was not entitled to make credibility determinations about contradictory testimony and incorporate them in findings of fact.

In this regard, the Ninth Circuit's decision was inconsistent with the decisions of other courts of appeals, which have held that the existence of oral testimony does not authorize a district court to exceed its limited function on summary judgment motions: to determine whether there is a genuine issue for trial after drawing reasonable inferences in favor of the nonmovant. *See Riley v. Brown & Root, Inc.*, 896

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[6] As discussed at note 2 above, the court of appeals is incorrect when it states that Kreisner did not object to the evidentiary hearing. The court of appeals also complained that "Kreisner did not object to our remand order...." (a-8 n.3.) Petitioner is aware of no procedure, however, for objecting to a court of appeals remand order. Moreover, if properly carried out, the Remand Order itself might not have been objectionable. Kreisner suggested that a proper way of proceeding under the Remand Order "would be to further develop the factual record through the usual procedures that anticipate a motion for summary judgment and determining through that process whether there are disputed issues of material fact." (a-92.) Moreover, the district court itself first read the Remand Order as requiring exactly this approach. (a-91.)

F.2d 474, 476 (10th Cir. 1990) (despite district court's evidentiary hearing, district and appeals courts "must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues"). Instead, testimony adduced in an evidentiary hearing is treated exactly the same as testimony given in a deposition. *See Hancock Industries v. Schaeffer*, 811 F.2d 225, 230-31 & n.2 (3d Cir. 1987); *see also Country Floors, Inc. v. Gepner*, 930 F.2d 1056, 1061 (3d Cir. 1991) ("the district court, when it granted the [defendant's] summary judgment motion, inappropriately considered credibility findings that it made in denying [plaintiff] a preliminary injunction").

The conflicting testimony at the hearing concerning the City's permit policy demonstrated that there was a fact dispute. *See Stewart v. RCA Corp.*, 790 F.2d 624, 628 (7th Cir. 1986) ("A disagreement among live witnesses — [plaintiff] and [defendant]'s witnesses gave contradictory renditions of what [plaintiff] had been told and when — is as much a 'genuine issue' as a court ever sees."). Properly used, the hearing testimony should have served only to demonstrate that a trial on the merits was required — no more and no less.

The court of appeals also departed from long-established summary judgment standards by reviewing the district court's findings for clear error. (a-8 n.3.) As Judge Boochever noted in his dissent, "The district court on remand arrived at conclusions to disputed questions after hearing contradictory testimony, but the majority now accepts those conclusions using the clearly erroneous standard of review." (a-33 to a-34.)

Until now, courts of appeals, including the Ninth Circuit Court of Appeals, have reviewed summary judgment appeals *de novo*. *See, e.g., Swarner v. U.S.*, 937 F.2d 1478, 1481 (9th Cir. 1991) ("The findings of fact in a district court's order of summary judgment are not protected by the deferential clear-error standard of review."). The *de novo* standard applies even when the trial court has conducted "a rather extensive

evidentiary hearing." *Riley,* 896 F.2d at 476. The clear error standard is properly used only to review findings of fact rendered after a trial. *See* Fed. R. Civ. P. 52(a); *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir. 1987); *Riley,* 896 F.2d at 476 ("Although the district court made detailed statements of its views on the evidence, those determinations are not entitled to the deference due findings of fact made by a trial court after an evidentiary trial on disputed issues of fact").

By refusing to apply the proper *de novo* standard of review, the court of appeals in essence reviewed the district court's findings as if they followed a trial. Thus, the court of appeals' decision denied Kreisner the appellate scrutiny appropriate to summary judgment proceedings.

II. THE COURT OF APPEALS' "NON-GARDEN VARIETY" SUMMARY JUDGMENT PROCEDURE IS INCONSISTENT WITH THE STRUCTURE AND LOGIC OF THE FEDERAL RULES OF CIVIL PROCEDURE

The decision of the Ninth Circuit Court of Appeals not only applies to this Establishment Clause case, but also creates a procedure applicable to other summary judgment cases. This procedure is at odds with the entire structure and logic of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure distinguish between summary judgment and trials on the merits, and between the roles of trial and appellate courts. The district court's analysis of disputed facts on summary judgment has always been carefully circumscribed, preserving the separate function of the trial under the Rules.

The court of appeals' decision disrupts the function of a district court, particularly its function in resolving factual disputes. Rule 56 dictates that at the summary judgment stage, the district court is to cull for trial issues subject to genuine

dispute and to dispose of all other issues. *See Celotex Corp.*, 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."); *see also* William W. Schwarzer *et al.*, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 451 (1991) ("Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties.").

The court of appeals' decision here would allow district courts to use credibility determinations to dispose of any claim on summary judgment, even one for which the nonmovant offers factual support. This is prohibited by Rule 56. The only procedure wherein a district court may resolve fact disputes is a trial. *See Country Floors, Inc.*, 930 F.2d at 1062 ("Credibility determinations that underlie findings of fact are appropriate to a bench verdict. They are inappropriate to the legal conclusions necessary to a ruling on summary judgment.").

Trials are governed by Rules 38-53 and by the well-developed body of rules, standing orders, and court decisions designed to ensure procedural fairness. Summary judgment disposes of these protections only when the record indicates that they are not necessary. That was not the case here. The court of appeals' procedure authorizes a trial by ambush, even when, as here, the parties object and the district court has refused to allow discovery. *See id.* ("Reliance on credibility determinations in deciding Rule 56(c) motions may ... improperly shift the ultimate burdens of production and persuasion, [and] deprive the non-movant of the benefit of competing inferences or the opportunity to present additional evidence or engage in additional discovery.").

The court of appeals' decision also shifts the allocation of responsibility between the district courts and courts of appeals. Under the Federal Rules, fact disputes must be

resolved in the district courts. In this case, the court of appeals decided to take cognizance of a factual representation first made at oral argument (itself a dubious procedure). Then, instead of reversing the grant of summary judgment and remanding for trial to resolve the resulting factual dispute, the court of appeals issued a limited remand order, retained jurisdiction, and ultimately, sanctioned an evidentiary hearing.

In so doing, the court of appeals invaded the province of the district court. Its decision, if undisturbed, will mean that whenever a court of appeals perceives an unresolved fact dispute — even one suggested for the first time at oral argument — it can utilize the district court as its fact finder without a trial or any of its attendant procedural protections. This is beyond the authority and function of the appellate courts.

* * *

The court of appeals' decision drastically alters the federal courts' functions. By allowing the district court on a motion for summary judgment to resolve material fact disputes based on credibility determinations and to construe the evidence in the movant's favor, and by reviewing the district court's findings of fact only for clear error, the court of appeals has paved the way for other courts to devise "non-garden variety" summary judgment procedures that deviate from the most basic principles of federal civil procedure.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Dated: November 1, 1993

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APPENDIX A
OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD T. KREISNER, et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO,
Defendant-Appellee.

No. 90-55354

D.C. No. CV-88-1993-WBE

Argued April 3, 1991

Submission Deferred April 3, 1991

Submitted February 19, 1993

Filed March 3, 1993

Amended; Petition for Rehearing Denied; and
Suggestion for Rehearing En Banc Rejected August 2, 1993

COUNSEL

Michael A. Jacobs, John F. Delaney, Susan St. Amour, Morrison & Foerster, San Francisco, California, for the plaintiffs-appellants.

Mary Kay Jackson, Deputy City Attorney, San Diego, California, for the defendant-appellee.

Before: BOOCHEVER, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

ORDER

The majority opinion filed on March 3, 1993 is amended as follows:

slip op. at 1698 line 5 of first full ¶	change "Rather than resolve the dispute ourselves," to "To resolve the dispute,"
slip op. at 1698 n.2	add "Nor can our remand order fairly be read to authorize the district court to consider issues not raised in the briefs. In any event, *Widmar* teaches us that a state's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause and the Free Speech Clause as well. *Widmar*, 454 U.S. at 276. Thus, even though the California Constitution's provision prohibiting governmental establishment or preference of religion may be broader than the United States Constitution, *see Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991), it, like the Establishment Clause of the Federal Constitution, must be limited by the Free Exercise Clause and the Free Speech Clause. *Widmar*, 454 U.S. at 276."
slip op. at 1698 n.3 line 6	after "Here," add "our remand order stated: Specifically, the district court shall determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. On remand,"
line 8	before " Kreisner" add "Although he objected to the nature of the district court's findings," After " Kreisner did not object" add "to our remand order or"

line 14	after "(9th Cir. 1986)" add "(findings of fact made after evidentiary hearing reviewed under the clearly erroneous standard)."
slip op. at 1707 end of carryover paragraph	after "... the messages.)" add "; *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147-48 (1993) (assuming arguendo that school premises constituted limited public forum, concluding that school district violated Free Speech Clause by denying church access to exhibit film solely because of religious subject matter)."
slip op. at 1707 line 13 of first full paragraph	after "454 U.S. at 271" add "; *see also Lamb's Chapel*, 113 S. Ct. at 2148."

A majority of the panel voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Boochever would grant the petition for rehearing and recommended acceptance of the suggestion for rehearing en banc.

The full court was advised of the en banc suggestion. An active judge of the court requested an en banc vote. The case failed to receive a majority of the votes of the non-recused active judges. Fed. R. App. P. 35. With the above amendments, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

This appeal squarely presents a conflict between two of our most deeply cherished liberties: freedom of speech and freedom of religion. The question we must decide is whether the City of San Diego may, consistent with the Establishment Clause of the United States Constitution, permit a private group to erect a religious display in a public park during the

Christmas season. Because the park is a traditional public forum removed from the seat of government, we hold that the City may permit the display provided it does so in a non-discriminatory manner.

I

San Diego's Balboa Park is a 1200-acre public park containing recreational facilities ranging from theatres, museums, and a zoo to picnic areas and sporting fields. Every year during the Christmas holiday season, Balboa Park is the site of a holiday display. The City, in conjunction with a private non-profit group known as the Community Christmas Center Committee ("the Committee" or "the Christmas Committee"), sponsors a secular holiday display, which includes a Santa Claus, reindeer, a Christmas tree, and numerous festive colored lights. That display is not challenged here.

Some 250 feet away from the secular display, and partially separated from it by a wall and a road, is a small, open-air amphitheatre known as the Organ Pavilion. Each year, the Christmas Committee is granted a permit to set up a display consisting of scenes from the New Testament in the Organ Pavilion. The Committee's display, which remains in place for approximately six weeks from late November through early January, includes eight scenes, four of which are placed on each side of the Pavilion's stage. Each scene is housed in a palm-covered booth ten feet high and fourteen feet wide. Each contains life-size statuary depicting a biblical scene from the life of Christ, a painted backdrop, and a descriptive sign. Seven of the eight scenes also include gospel passages in English and Spanish. As described by the signs, the eight scenes and their accompanying biblical passages are as follows:

Scene	*Biblical Quotation*
The Annunciation	"Fear not Mary: for thou hast found favour with God; and behold, thou shalt bring forth a son, and shalt call his name Jesus." Luke 1:30-31
[no description; Mary and Joseph being turned away from the inn.]	"there was no room for them at the Inn." Luke 2:7
Angel appearing before the shepherds	"The shepherds said, let us now go … and they came with haste and found both Mary and Joseph, and the babe lying in a manger." Luke 2:15-16
The birth of Christ	[text does not appear in record]
Wise Men on their way to Bethlehem	"Behold, wise men from the east came to Jerusalem saying, Where is he that is born King of the Jews? … for we are come to worship him." Matt. 2:1-2
The Flight into Egypt	"Arise and take the young child and his mother, and flee into Egypt, for Herod will seek the young child to destroy him, and Joseph took them by night." Matt. 2:13-14
Christ in the Temple	[no text]

Suffer the little children to come unto me	"But Jesus said, Suffer the little children to come unto me, and forbid them not; for to such belongeth the Kingdom of God." Mark 10:14

One or more disclaimer signs, stating that the Biblical display is privately sponsored and not allied with the City, accompany the display. The record does not reveal the size, text, or location of these disclaimers.

The Committee pays no fee for its use of the Organ Pavilion. The City ordinarily charges organizations who wish to reserve the Pavilion for exclusive use a fee varying from $440 to $1,325 per day, depending upon the nature of the use and the user. City regulations allow waiver of these fees for nonprofit community services organizations, defined as "recognized group[s], club[s], agenc[ies] or organization[s] whose activities are of a service or character building nature, who give service to the community as a whole, and ... where no portion of the net earnings are used for or inure to the benefit of any individual or member of the group."

The City explains that it charges no fee for the Committee's display because the Committee's use of the Organ Pavilion is "non-exclusive." Other groups and individuals can and do use the Pavilion while the display is in place. The City represents that, if another user so requests, it will require the Committee to cover the display while any overlapping exclusive use permit is in effect.

The Committee's Biblical display has been an annual tradition in Balboa Park since 1953. The Committee has always owned the statuary and booths. Before 1988, the display was erected and removed each year by City employees, and stored on City property. In the wake of an opinion issued by the City Attorney to the effect that the City's involvement was unconstitutional, the Committee now erects, removes, and maintains the display itself, and stores it on private property. The Committee reimburses the City $150 for the estimated cost of

electricity used by the display. The City provides no other services in connection with the display.

To help defray the costs of the display, the Committee maintains donation barrels at the site. It also maintains a stock of small pamphlets, which contain a schedule of concerts and events to be held at the Pavilion during the Christmas season, a brief history of the Christmas Committee, and a plea for donations to support the Committee's activities.

Acting pro se, appellant Howard Kreisner filed suit in the federal district court seeking to prevent the City from allowing the Committee to erect the display on public property. Kreisner alleged that the City's decision to permit the display in Balboa Park violated the religion clauses of both the federal and state constitutions. His complaint requested declaratory and injunctive relief, as well as punitive and other damages. [1]

The parties agreed that no material facts were in dispute, and submitted cross motions for summary judgment. On November 8, 1989, Judge Enright granted judgment for the City on the federal claim and dismissed the state claim.[2] This

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[1]Kreisner has standing to bring this action based on his allegation that the challenged display interferes with his right to use Balboa Park. *See Hewitt v. Joyner*, 940 F.2d 1561, 1564 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992); *ACLU v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1107-08 (11th Cir. 1983). Because this injury is sufficient to establish standing, we need not consider whether Kreisner would have standing as a municipal taxpayer. *See Cammack v. Waihee*, 932 F.2d 765, 770-72 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992).

[2]In his supplemental brief following our limited remand, Kreisner attempted to resurrect his state constitutional claim. Because he failed to challenge the district court's dismissal of that claim in his opening and reply briefs on appeal, we deem the issue waived and decline to address it. *See In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 324 (9th Cir. 1991). Nor can our remand order fairly be read to authorize the district court to consider issues not raised in the briefs. In any event, *Widmar* teaches us that a state's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause and the Free Speech Clause as well. *Widmar*, 454 U.S. at 276. Thus, even though the California Constitution's provision prohibiting

timely appeal followed. This court appointed counsel to represent Kreisner on appeal.

After the appeal was argued before this panel, it became obvious that the parties disagreed about the nature of the City's permit policy in Balboa Park. They submitted competing declarations and affidavits describing the policy to us. To resolve the dispute, we remanded to the district court for entry of factual findings.[3] The district court (Judge Huff, following Judge Enright's recusal) held a hearing and determined that the City followed a first-come, first-served policy in Balboa Park. Judge Huff also reaffirmed Judge Enright's conclusion of law that permitting the display on public property did not violate the Establishment Clause of the United States Constitution.

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governmental establishment or preference of religion may be broader than the United States Constitution, *see Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991), it, like the Establishment Clause of the Federal Constitution, must be limited by the Free Exercise Clause and the Free Speech Clause. *Widmar*, 454 U.S. at 276.

[3]The dissent states that because we are reviewing the district court's grant of summary judgment we should view the evidence in the light most favorable to Kreisner, rather than adopt the findings of fact of the district court. The dissent relies on *Swarner v. United States*, 937 F.2d 1478 (9th Cir. 1991). But garden variety summary judgment cases, like *Swarner*, are far different from this one. Here, our remand order stated: Specifically, the district court shall determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. On remand, the district court made findings of fact after holding an evidentiary hearing and taking testimony in open court. *See* Findings of Fact and Conclusions of Law 52 C.R. at 2-3. Although he objected to the nature of the district court's findings, Kreisner did not object to our remand order or to the holding of an evidentiary hearing, nor is there any indication that he did not have sufficient notice to present his case. Considering the extent of the hearings below and our earlier order focusing the district court's efforts, there is no reason to depart from the clearly erroneous standard of review that we apply to findings of fact following an evidentiary hearing. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986) (findings of fact made after evidentiary hearing reviewed under the clearly erroneous standard).

We solicited additional briefing from the parties, and postponed submission pending the decision of the Supreme Court in *Lee v. Weisman*, 112 S. Ct. 2649 (1992). We now affirm.

II

A

The First Amendment provides that "Congress shall make no law respecting an establishment of religion ..." U.S. Const. amend. I. Although written as a limitation upon congressional power, this clause also operates, through the Fourteenth Amendment, to constrain the power of state governments. *See Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947).

Like most cherished social values, the principle of religious freedom that is embodied in the Establishment Clause is easy to proclaim but difficult to define: "Candor compels acknowledgment ... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Supreme Court has, however, generally articulated the boundaries of the Clause's coverage. In a world of constant compromise and qualification, the Establishment Clause

> means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson, 330 U.S. at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)). Or, more succinctly put:

> In the course of adjudicating specific cases, [the Supreme Court] has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

County of Allegheny v. ACLU (*"Allegheny County"*), 492 U.S. 573, 590-91 (1989).

On the other hand:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Lee v. Weisman, 112 S. Ct. at 2661 (quoting *Abington School District v. Schempp,* 374 U.S 203, 308 (1963) (Goldberg, J., concurring)). The Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny County,* 492 U.S. at 657 (Kennedy, J., concurring and dissenting).

Applying these general tenets in the context of a particular case "remains a delicate and fact-sensitive" task. *Lee v. Weisman,* 112 S. Ct. at 2661.

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready

application. The purpose of the Establishment Clause "was to state an objective, not to write a statute."

Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970)).

In the context of religious holiday displays, the Court's Establishment Clause jurisprudence has been particularly fact-bound. No clear general principles emerge from the two most recent cases considering the constitutionality of such displays. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court found no Establishment Clause violation in the City of Pawtucket's ownership and annual display of holiday decorations including, among other things, a Santa Claus, a Christmas tree, and a Nativity scene. The display was located in a privately-owned park in the heart of the City's shopping district. In *Allegheny County*, a deeply divided Court held unconstitutional the display of a privately-owned creche on the "Grand Staircase" of the County courthouse, but permitted a second privately-sponsored display consisting of a menorah, a Christmas tree, and a sign saluting liberty outside a government office building a block from the courthouse. Together, *Lynch* and *Allegheny County* call for a detailed contextual inquiry that has been aptly described as "requiring scrutiny more commonly associated with interior decorators than with the judiciary." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

B

Although the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch*, 465 U.S. at 679, it has generally applied the three-part test first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether a challenged practice or statute comports with the Establishment Clause. Moreover, despite criticisms by current members of the Court, *see Lee v. Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting) (cataloging such criticisms), the Supreme Court expressly declined to reconsider the *Lemon* test in *Lee, id.* at 2655

(opinion of the Court). We therefore see no justification for the dissent's articulation of a new Establishment Clause test.

Even were a new test warranted, the dissent's proposed sliding scale test has what we see as a major flaw: It requires the court to judge the "intensity" of the religious message. This is problematic in a [sic] several significant ways. First, an inquiry into the intensity of a religious symbol essentially asks how "central" that symbol is to the faith it represents. For example, is a menorah more intense than a cross? The Supreme Court has disapproved this sort of inquiry in religion cases. *See Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990) (constructing free exercise test to avoid judicial inquiry into the "centrality" of a practice to a person's faith); *see also Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith ..."); *United States v. Lee*, 455 U.S. 252, 257 (1982) ("It is not within the judicial function and judicial competence, however, to determine whether appellee or the Government has the proper interpretation of the Amish faith ...") (quotation omitted). Second, the dissent's test raises a difficult question of perspective. The dancing Siva, Nataraja, has much religious import to a Hindu, but its significance would be lost on most Americans. From whose perspective do we determine intensity? The reasonable Judeo-Christian observer? There are no judicially manageable standards to apply in making these sensitive judgments. Finally, the likely consequence of the dissent's test would be that only diluted religious messages would be allowed in public forums. Yet *Lee v. Weisman* cautioned against precisely this result:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while con-

> cern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."

Id. at 2656-57 (citations omitted). In the same way that government-crafted prayers threaten to water down religious messages, permitting only those Christmas displays that are of minimal "intensity" will detract from or destroy their religious significance. The *Lemon* test focuses our inquiry on the objective circumstances—such as its location and sponsorship—that measure the government's involvement in the religious display. The test thus avoids the serious risks associated with judicial scrutiny of the content of the message conveyed.

In our application of the *Lemon* test, we take guidance from *Allegheny County*, 492 U.S. at 592, where the Court explained:

> Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.

The challenged practice must survive all three prongs of the *Lemon* analysis in order to pass constitutional muster. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Kreisner argues that the City's grant of a permit allowing the Committee to erect its display in Balboa Park violates each facet of the *Lemon* test.

1

A government practice or statute fails the purpose prong of Lemon if its purpose is to endorse a religious custom or

viewpoint. *See Allegheny County*, 492 U.S. at 592; *Edwards*, 482 U.S. at 593; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). "Government endorsement of religion has been found when the government conveys or attempts to convey a message that a particular religion is favored or preferred, or when it promotes one religion or religious theory against another or even against the militant opposite." *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 307 (1992). As Justice O'Connor explained in her concurring opinion in *Lynch*: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

A practice will stumble on the purpose prong "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Cammack*, 932 F.2d at 774. A reviewing court must be "reluctant to attribute unconstitutional motives" to government actors in the face of a plausible secular purpose. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

We have no difficulty concluding that the City's decision to permit the Committee to erect its holiday display in Balboa Park is supported by a legitimate, sincere secular purpose. The City cites two such purposes: (1) the promotion of holiday spirit and (2) the promotion of free expression. We need not consider the City's first avowed purpose because the second suffices. The Supreme Court has made it clear that a policy of permitting open access to a public forum, including non-discriminatory access for religious speech, is a valid secular purpose. *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

The City's past sponsorship of the display does not undercut our conclusion. It is undisputed that the City no longer acts as a sponsor. Further, the City has taken affirmative steps to disassociate itself from the Committee and the display. Under the circumstances, the City's past conduct is not persuasive evidence of its current motives.

Purposes aside, Kreisner contends that the principal and primary effect of granting the Committee's annual request for a permit is to advance one particular religion and its theological viewpoint. The test under this prong is whether "the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). The question, in other words, is whether the government's action "actually conveys a message of endorsement" of religion in general or of a particular religion. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment).

We assume that, were the Committee's display sponsored by the government, its overwhelming message of glorification of the divinity of Jesus Christ would violate the Establishment Clause. Notwithstanding its strong religious content, however, we conclude that because the display is private speech in a traditional public forum removed from the seat of government it does not have the primary effect of advancing religion. We set forth below the reasoning by which we arrive at this conclusion.

a

Essentially, the question presented here is whether placement of a private, overtly religious holiday display on public property represents government endorsement of religion. The Supreme Court has not yet squarely addressed this issue. *Cf. Allegheny County*, 492 U.S. at 600 n.50 (creche display on courthouse staircase does not raise public forum issue). This question was presented but not authoritatively resolved in *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985) (lower court decision holding that city could constitutionally allow private group to display creche in traditional public forum affirmed by an equally divided court). It has divided the circuits. *See Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc) (injunction forbidding display of religious paintings by private

organization in public park held overbroad); *Chabad-Lubavitch of Georgia v. Miller*, 976 F.2d 1386 (11th Cir. 1992) (per curiam) (private group properly prohibited from erecting menorah on plaza in front of, or in the rotunda of, state capitol building). Even within individual circuits, the answer has not always been consistent. *Compare Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (holding that permitting private display of menorah in City Hall Park violated Establishment Clause), *cert. denied*, 496 U.S. 926 (1990), *with McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (holding that village's grant of a permit allowing private group to display creche in public park did not violate Establishment Clause), *aff'd by an equally divided court sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985). Indeed, as Judge Boggs, writing for the Sixth Circuit, noted in *Americans United for Separation of Church and State v. City of Grand Rapids* ("*Grand Rapids I*"), 922 F.2d 303 (6th Cir. 1990), virtually every panel to consider this issue has found itself divided.

In addressing ourselves to this difficult question, we start from the observation that Balboa Park, a public park which is held open for various expressive activities, is unquestionably a traditional public forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (describing public parks as "quintessential public forums"); *Hague v. CIO*, 307 U.S. 496, 515 (1939) (parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Religious speakers have the same right of access to public forums as others. *Widmar*, 454 U.S. at 269; *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring); *O'Hair v. Andrus*, 613 F.2d 931, 935 (D.C. Cir. 1979) ("The government may not allocate access to a public place available for communication among citizens on the basis of the religious content of the messages."); *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147-48 (1993) (assuming arguendo that school premises constituted limited public forum, concluding that school district violated Free Speech Clause by denying church

access to exhibit film solely because of religious subject matter).

It necessarily follows from the fact that Balboa Park, including the Organ Pavilion, is a traditional public forum, that the City may not enforce a content-based restriction on private speech there without a compelling interest, and that any such restriction must be narrowly tailored to achieve that interest. *Perry Educ. Ass'n*, 460 U.S. at 45.[4] This means that, absent some compelling state interest, the City cannot forbid the Committee from erecting its display in Balboa Park because of the religious content of the message. The Supreme Court has raised, but never resolved, the question whether avoiding an Establishment Clause violation provides a compelling state interest justifying a content-based restriction on speech in a public forum. *See Widmar*, 454 U.S. at 271; *see also Lamb's Chapel*, 113 S. Ct. at 2148. The *Widmar* analysis of such a case involves two steps: first, determining whether there is a violation of the Establishment Clause; then, deciding whether avoiding the violation is an interest sufficiently weighty to justify placing restraints on free speech.

Thus, in this case, we must first decide whether the City's open forum policy, which accommodates the Committee's religious display, violates the Establishment Clause. If it does not, the predicate is lacking for restricting speech in Balboa Park, and the policy will stand. If there is an Establishment Clause violation, we must turn to the (even more difficult) question of whether avoiding that violation provides a compelling state interest that justifies placing a content-based restriction on religious speech in a public forum—a restriction that would otherwise would [sic] be forbidden by the Free Speech Clause.

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[4] *But see Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring) (disputing the precedential basis for a compelling state interest balancing test, and arguing for an approach in which all restrictions falling outside recognized categories, such as fighting words or obscenity, are automatically invalidated).

b

In evaluating the effect of the City's grant of a permit to the Committee, we apply the standard of a "reasonable observer." *Allegheny County*, 492 U.S. at 620 (opinion of Blackmun, J.). This hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the Free Speech Clause and public forum doctrine. *See Wallace*, 472 U.S. at 76, 83 (O'Connor, J., concurring in the judgment). For purposes of this case, then, we assume that the reasonable observer is aware of Balboa Park's public forum nature and the City's first-come, first-served permit policy. Our observer realizes that the Park and the Organ Pavilion host an eclectic range of uses throughout the year.

In our view, such an observer could not fairly interpret the City's tolerance of the Committee's display as an endorsement of religion. To paraphrase Judge Boggs writing for the en banc court at a subsequent stage of the *Grand Rapids* litigation:

> By allowing the display ... the city merely states that it neither favors nor disfavors religious speech. In fact, [the city] does not even go so far as to "acknowledge" religion by permitting the [biblical] display; it merely sends a message that religious groups will be treated no worse than others. Anyone familiar with [Balboa Park] soon realizes that many groups use it, and that none of these groups receives special treatment from [the city].

Americans United for Separation of Church and State v. City of Grand Rapids ("*Grand Rapids II*"), no. 90-2337, slip. op. at 13 (6th Cir. Nov. 16, 1992) (en banc). *See also O'Hair*, 613 F.2d at 935 ("When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to *all* others (religionists and anti-religionists), there is no 'establishment of religion,' and there cannot be a meaningful

perception of one.").[5] Because Balboa Park is a traditional public forum, we conclude that San Diego conveys no message of endorsement by allowing the Christmas Committee to display its biblical booths there.

Again, the City's past sponsorship of the display does not mandate a different conclusion. We will not punish the Committee for the City's past mistakes. "Neither official disfavor nor the rebound effect of official approbation can make a difference when the Constitution puts choice in private hands. A blunder by public officials cannot restrict the scope of private speech." *Doe v. Small,* 964 F.2d at 629 (Easterbrook, J., concurring).

We reject Kreisner's contention that public forum doctrine does not apply here because the Organ Pavilion is not a public forum for large unattended displays. This argument misperceives the nature of Balboa Park, which is a traditional public forum, not a public forum by designation. Designated public forums are areas opened and designated by the state for expressive activity. *Cornelius v. NAACP Legal Defense and Educ. Fund,* 473 U.S. 788, 802 (1985). Access to such designated public forums may be restricted "to the original recipients of the government's permission and to entities similar in character." *Monterey County Democratic Central Comm. v. United States Postal Serv.,* 812 F.2d 1194, 1196 (9th Cir. 1987). Thus, if Balboa Park were a designated public forum, the fact that the City permitted certain types of expressive activity there would not require it to permit other forms of speech, such as large unattended displays. Traditional public forums, such as parks and public streets, however, are open to all manner of speech, subject only to reasonable time, place, and manner restrictions. No affirmative government action is required to open a traditional public forum to a specific type of expressive activity.

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[5]In concluding that San Diego has not endorsed the Committee's religious views by allowing it to erect its display in the Organ Pavilion, we do not rely upon the details of the disclaimer sign, which do not appear in the record. We emphasize, however, that the presence of such a sign, while not dispositive, reinforces the reasonable observer's perception of no government sponsorship.

In fact, we have grave doubts about the City's ability, should it so choose, to withdraw the Organ Pavilion from its status as a traditional public forum. *See United States v. Grace*, 461 U.S. 171, 180 (1983) (traditional public forum does not lose its historically protected character because of proximity to other property, or by governmental *ipse dixit*). In any event, the City has made no such effort to limit uses of the Organ Pavilion. The record before us provides no indication that the City has treated the Organ Pavilion as anything other than a traditional public forum. The Pavilion is open to use by a wide variety of persons for a wide variety of purposes throughout the year. In the absence of any evidence that the City has closed Balboa Park or the Organ Pavilion to large unattended displays, we assume it has not. *Cf. Doe v. Small*, 964 F.2d at 619 (plaintiff bears burden of proving that government denies access to public forum). Accordingly, we reject Kreisner's argument that the Organ Pavilion is not a public forum for large unattended displays.

Kreisner relies on *Kaplan*, 891 F.2d at 1029, in which the Second Circuit held that allowing the private display of a menorah in City Hall Park would violate the Establishment Clause in part because "prior to the grant of the permits for the display of the menorah, [the City] had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols." We do not find *Kaplan*'s reasoning persuasive in the context of a traditional public forum such as Balboa Park. The mere fact that no other speaker in Balboa Park, so far as the record reveals, has chosen the medium of an unattended display cannot justify a rule of law that would force the City to forbid such displays based upon their religious content. Cf. *Kaplan*, 891 F.2d at 1032 (Meskill, J., dissenting) ("The park's status as a public forum does not depend upon whether the City has in the past permitted a particular type of speech or form of expressive conduct."). We refuse to place the burden on the City of showing that a traditional public forum is open to any particular form of speech. Rather, we think the burden must be on Kreisner to show that the City has *closed* the forum to large displays other than the Committee's. This burden has not been met.

Nor are we persuaded that under our interpretation the "public forum doctrine would swallow up the Establishment Clause." *Kaplan*, 891 F.2d at 1029. Public forum or not, the Establishment Clause limits the ability of government to engage in or to support religious speech. The City may not sponsor the Committee's display, or render preferential treatment to the Committee. *See Berger v. Rensselaer Central School Corp.*, 1993 U.S. App. LEXIS 74, 1993 WL 874, *5 (7th Cir. Jan. 5, 1993) (government "officials cannot retain discretion over content on the one hand and on the other pretend to be manacled by the dictates of content neutrality"). However, the Committee, like other citizens of diverse views, has the right to express its views publicly in areas traditionally held open for all manner of speech. Tolerance of religious speech in an open forum "does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. "Thus, ... truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer." *Grand Rapids II*, slip op. at 29 (emphasis in original). Indeed, exclusion of religious groups from a forum otherwise open to all would demonstrate government hostility to religion rather than the neutrality contemplated by the Establishment Clause. *Mergens*, 496 U.S. at 228.

The dissent makes much of the fact that "the property on which the display rests is owned and maintained by San Diego's taxpayers" and "the property is adorned with structural symbols of government," Dissent at 1739, but we are at a loss to understand the significance of these assertions. By its nature, a public forum will be on land owned by the government. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (private shopping center not a public forum).[6]

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[6]Whether certain types of government property are public fora has sharply divided the Court, *see, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711 (1992); *Cornelius v. NAACP Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), but thus far the Court has only reaffirmed the description of public fora that gave rise to the doctrine: "Wherever the title of streets and *parks* may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been

In part because Balboa Park houses some "structural symbols of government," the dissent believes a reasonable observer would think the Christmas Committee display was endorsed by the government. To support this argument the dissent lists the following structural symbols: "the United Nations Building, the Hall of Nations, the House of Pacific Relations, the Museum of Man, the San Diego Museum of Art, the Space Theater and Science Center, and the Natural History Museum." Dissent at 1739. We have found nothing in the record which discloses the relationship of any of these buildings to the City of San Diego; the complaint contains no allegations as to them. However, even if we assume they are owned or operated by the city, they appear to have nothing to do with functions associated with the seat of government. Rather, consistent with the nature of Balboa Park itself, they involve cultural and recreational activities unrelated to core governmental functions.

In any event, even the proximity of buildings of unmistakably governmental character is a patently imperfect proxy for attributing speech that goes on there to the government. The White House, perhaps the most visible structural symbol of our government, borders Lafayette Square in Washington, D.C., yet the square itself has consistently been upheld as a public forum. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Places that are near government buildings—where many people pass and have occasion to hear the speaker—are prime territory for the exercise of First Amendment rights. *See United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J. concurring) ("As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place."). It seems axiomatic to the public forum principle that we view messages expressed there as those of the actual speakers. The public forum doctrine would be rendered meaningless if only places in the middle of nowhere

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used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, (1939) (emphasis added).

could be free speech areas, and if all speech that occurred near "structural symbols of government" had to be viewed as government speech. The dissent treats this as another creche-on-the-courthouse-steps or menorah-in-the-capitol-rotunda case, which it clearly is not.

We simply are not called upon to decide here whether a private religious display located in a public forum closely associated with the seat of government might be constitutionally infirm.[7] Balboa Park, and in particular the Organ Pavilion where the Committee's display is located, is neither physically surrounded by nor intimately associated with the trappings of government. While Balboa Park may be a well-known San Diego landmark, it is not the equivalent of City Hall or a city office building.

C

Kreisner argues that, even if the City may issue a permit for the display on a non-preferential basis, as a matter of fact it grants the Committee an unconstitutional preference. We agree with the district court that Kreisner has failed to raise a material issue of fact in this regard. The City claims that its policy is first-come, first-served, regardless of the identity of the speaker or the content of the speech.[8] Kreisner is unable to point to any facts undermining that claim.[9]

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[7] *See, e.g., Kaplan,* 891 F.2d at 1025 (holding permit for private display of religious symbol in traditional public forum in front of seat of city government violative of Establishment Clause); *Smith v. County of Albermarle,* 895 F.2d 953, 955 (4th Cir.), *cert. denied,* 111 S. Ct. 74 (1990) (nativity scene could not be placed in public forum on front lawn of county office building by private group; determinative factor that "one could not readily view the creche without also viewing the trappings and identifying marks of the state"); *but see Kaplan,* 891 F.2d at 1033 (Meskill, J., dissenting) (park does not lose its status as a traditional public forum "merely because City Hall is located on one side" of it).

[8] At oral argument, the City represented to this court that any person could get a permit to place an unattended display in any part of the park, regardless of the content of the display, on a first-come, first-served basis.

A first-come, first-served policy, such as that employed by San Diego, is a valid means for regulating the use of a public forum. Such a policy does not vest impermissible discretion in any official. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

Nor do we find it significant that the City's first-come, first-served policy is not memorialized in the form of a written regulation.

> In the absence of any allegation (much less actual proof) that [San Diego] has denied any person access to the Park, it is immaterial that [San Diego] does not have an officially stated policy of equal access, for the Constitution mandates that religious speakers may not be discriminated against in a public forum on the basis of their speech. The City of [San Diego] is required to comply with the constitutional mandate regardless of whether it has an officially stated policy of doing so,

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The City further represented that no fee would be charged for such a display. Having made these representations, the City is now bound by them.

We hold here that Kreisner has failed to demonstrate that the City does not abide by its stated open-access policy. Should the City at any time fail to comply with that policy, a wrongfully excluded group may of course bring suit.

[9]After oral argument in this court, amicus ACLU attempted to "test" the City's permit procedures. Amicus sent an employee to the City's Parks and Recreation Department to request a permit for use of the Organ Pavilion in December 1991 for a display celebrating the bicentennial of the Bill of Rights. The ACLU had no intention of erecting such a display, and the employee was accordingly unable to supply the City with needed details concerning the size of the display. The City declined to issue the permit without such details, which were never provided. This little vignette in no way suggests that the City's claimed open-access policy is a sham.

Nor does it, as Kreisner now insists, cast doubt upon the district court's grant of summary judgment. A litigant who has been unable to demonstrate material issues of fact prior to an adverse decision cannot thereafter create such issues by his own behavior. Moreover, Kreisner affirmatively declared below that the case was ripe for summary judgment. We will not allow him to withdraw that concession based on his dissatisfaction with the court's ruling.

> and [Kreisner] has failed to demonstrate non-compliance.

Doe v. Small, 964 F.2d at 619.

d

Kreisner further contends that, even if the City has not violated the Constitution by permitting the display in the Organ Pavilion, it has done so by: (1) allowing the Committee to solicit donations; and (2) failing to charge a fee for the Committee's use of the Organ Pavilion.

i

Does permitting the Christmas Community Center to solicit donations at the site—through its bins and pamphlets—have the impermissible effect of both endorsing and supporting a particular sectarian viewpoint? The regulations governing park use state that "[t]o solicit funds is prohibited by City Ordinance." The definition of "solicitation" in the municipal code includes "[a]ny direct oral or written request for money, property or anything of value or any financial assistance of any kind," as well as "[t]he distribution ... of letters, posters, handbills, cards, folders, pamphlets, books, or circulars for the purpose of soliciting funds." San Diego Municipal Code section 57.01B(a), (b).

The Committee keeps a stock of pamphlets, which entreat visitors to "Help Us Keep the Community Christmas Center Going!," at the display. The pamphlets request that checks be made out to the Committee, and explain that "[t]o insure the continuing operation of the Christmas Community Center, voluntary contributions are essential." They also point out that gifts are tax deductible. Distribution of these circulars appears to fall within San Diego's definition of "solicitation."

We agree that enforcement of the non-solicitation rule against some groups, but not against others similarly situated, would impermissibly favor some speakers. Nonetheless, on the record before us, we find no Establishment Clause violation. Although Kreisner has amply demonstrated that the

Committee is permitted to solicit contributions in the park, he has not demonstrated that anyone else is prevented from engaging in similar solicitation. The City claims that it does not regard the type of request for donations made by the Committee as within the scope of its ordinance.

We decline to assume, in the absence of any evidence, that the City ordinarily attempts to enforce its ordinance to bar this kind of solicitation of charitable contributions. The opposite interpretation might raise serious constitutional issues. Solicitation of charitable contributions is protected speech. *International Soc'y for Krishna Consciousness v. Lee,* 541, 112 S. Ct. 2701, 2705 (1992); *Riley v. National Federation of Blind,* 487 U.S. 781, 789 (1988); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980). Consequently, restrictions on solicitation in traditional public forums must be narrowly drawn to serve a compelling government interest. It is not immediately apparent that exclusion of solicitation of the sort engaged in by the Committee would serve any compelling interest. Given the serious constitutional issues raised by the ordinance, we decline to require San Diego to apply it to the Committee's fund-raising efforts in the absence of evidence that it is similarly enforced against other groups.

II

Kreisner also contends that the City's failure to charge the Committee a permit fee constitutes an impermissible public subsidy and endorsement of religion. We disagree.

The City's written park regulations require non-profit organizations to pay $440 per day for exclusive use of the Organ Pavilion, provided members of the public are not charged admission. If the organization does charge admission, the City's fee doubles to $885 per day. Profit-oriented, commercial users must pay $1,325 per day.

The City's regulations contemplate waiver of these fees only in the case of a "nonprofit community service agency or organization." San Diego Park & Recreation Dep't Fee Policy and Fee Schedule, 8.2.4 (Sept. 16, 1986). The regulations define

such an organization as "[a] recognized group, club, agency, or organization whose activities are of a *service or character building nature,* who give service *to the community as a whole,* and a group where no portion of the net earnings are used for or inure to the benefit of any individual or member of the group." *Id.* (emphasis added). We doubt that the Committee qualifies for a waiver under the regulations, but we need not decide the issue because the City does not rely upon the waiver rules.

The City instead contends that its fee regulations do not apply to the Committee's use of the Pavilion because that use is, in the City's words, "non-exclusive." The City claims that it assesses fees only for "exclusive" permits, which entitle the holder to restrict public access to the area for the duration of the permit. The Committee's display does not occupy the stage, nor does it prevent others from gathering in the amphitheatre. The record reveals that other groups have used the Pavilion while the display is in place. While certain other groups might be reluctant to share the Pavilion with the Committee's indisputably religious display, the Committee in no way seeks exclusive physical control of the Pavilion during its display. Furthermore, the City represents that, should another party seeking an exclusive use permit so request, the Committee would be asked to cover its display temporarily.

Kreisner cites to no evidence that fees are ordinarily charged to non-exclusive users, nor does he provide any basis for challenging the City's categorization of the Committee's use as non-exclusive. Accordingly, we conclude that the City's grant of a non-fee permit to the Committee is consistent with a content-neutral policy and does not violate the Establishment Clause.[10]

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[10]We emphasize once again that our holding does not preclude future actions against the City should the City fail to adhere to its content-neutral policy. Should the City seek to charge rental fees to another group requesting a permit to place an unattended display in Balboa Park, that group could challenge the City's action. Furthermore, evidence that fees are assessed

The third and final prong of the *Lemon* test requires invalidation of a government practice if it fosters an excessive government entanglement with religion. *Lemon,* 403 U.S. at 613. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

There is no appreciable institutional entanglement in this case.[11] The City of San Diego provides two forms of aid to the Committee. It grants the Committee's annual request for use of the Organ Pavilion, and to the extent that the display might consume more than $ 150 worth of electricity, it subsidizes the excess. Both forms of aid are indirect and de minimis; neither demonstrates that the City has an active, deeply involved relationship with the Committee. See *Lynch,* 465 U.S. at 671, 684 (twenty-dollar cost incurred by the city in erecting and dismantling creche and nominal expenses for lighting did not constitute excessive support for religious activity). The City does not supervise or provide input on the content or design of the display. In fact, the danger of entanglement would be considerably greater if the City screened the religious motives of speakers before allowing them access to Balboa Park. *Widmar,* 454 U.S. at 272 n.11.

The City's past involvement in the display was more troublesome under the entanglement prong, but that involve-

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against similar users but not against the Committee would tend to show a City preference for or endorsement of the Committee's religious message.

[11]Kreisner does not allege that political divisiveness engendered by the City's action violates *Lemon*'s entanglement prong. While the Supreme Court has on occasion suggested that political divisiveness is relevant to the entanglement analysis, *see Committee for Public Education v. Nyquist,* 413 U.S. 756, 796 (1973); *Lemon,* 403 U.S. at 623, it has emphasized that divisiveness alone does not render a practice unconstitutional. *See Lynch,* 465 U.S. at 684; *id.* at 669 (O'Connor, J., concurring).

ment has been discontinued. Assuming that the City's past practices (particularly the supervision of the Committee's fund-raising efforts) amounted to excessive entanglement, we do not view them as relevant to the question of whether the display as currently conducted violates the Establishment Clause.

III

For the foregoing reasons, we hold that the City has not violated the Establishment Clause by allowing the Christmas Committee to erect a religious display in the Organ Pavilion. We therefore need not determine whether avoiding an Establishment Clause violation would justify excluding the Christmas Committee's religious speech from the public forum. The City remains free to impose reasonable time, place, and manner restrictions on speech in Balboa Park, including religious speech, provided those regulations are content-neutral. We will not, however, force the City to impose such restrictions based on the content of the Committee's speech; to do so would violate the Free Speech Clause, turning the public forum doctrine on its head.

We emphasize that the City must treat the Committee as it would any other speaker in Balboa Park. On this record, we conclude that Kreisner has not raised a factual issue of preferential treatment.

AFFIRMED.

KOZINSKI, Circuit Judge, concurring:

> Joe Religious Speaker comes to the City of San Diego and asks for a permit to put on a display in Balboa Park exalting the power of Zon.
>
> "Sorry," say the City Fathers and Mothers.
>
> "Why not?" he asks. "Isn't Balboa Park sort of a Hyde Park West where anybody is free to say whatever he wants? In fact, didn't I see a Ku Klux Klan

poster, a Communist Manifesto display and an Atheists United banner there?"

"Well, yes," they respond. "Anybody can put up anything he wants there—except religious things. We're afraid people will think the City is sponsoring religion."

This is a conversation that should never happen. Religious speech is *speech,* entitled to exactly the same protection from government restriction as any other kind of speech—no more and no less. *See Widmar* v. *Vincent,* 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion ... are forms of speech and association protected by the First Amendment."). The government has many good reasons for restricting racist speech, advocacy of Communism, pornography and various other kinds of speech that some might see as harmful. But the Free Speech Clause stands in the way. *See, e.g., R.A.V.* v. *City of St. Paul,* 112 S. Ct. 2538 (1992); *Yates* v. *United States,* 354 U.S. 298, 318-19 (1957); *American Booksellers Ass'n* v. *Hudnut,* 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion,* 475 U.S. 1001 (1986); *Cohen* v. *California,* 403 U.S. 15 (1971); *Collin* v. *Smith,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978). I can't see how the fear that someone might—mistakenly—think the government is endorsing religious speech is a better justification for censorship than those rejected in these cases and countless others.

The Establishment Clause, as the name suggests, forbids only the establishment of religion, not the mere appearance of doing so. Many government actions are consistent with religiously-inspired values and can appear to some as endorsing religion. *See, e.g., Bowen v. Kendrick,* 487 U.S. 589, 605 (1988) (challenging on establishment grounds governmental program promoting abstinence); *Phelps v. Reagan,* 812 F.2d 1293, 1294 (10th Cir. 1987) (claim that appointment of an ambassador to the Vatican is establishment of religion). Appearances only support an Establishment Clause claim when the government is speaking—when, for instance the government puts up a

crèche or a Christmas tree.[1] But no case, including the cases Judge Boochever mentions, *see* dissent at 8137-38 holds that appearances are relevant to *private* speech protected by the Free Speech Clause. The very case Judge Boochever relies on—*County of Allegheny v. ACLU*, 492 U.S. 573 (1989)—makes this clear: "The Grand Staircase does not appear to be the kind of location in which all were free to place their displays. ... In this respect, the crèche here does not raise the kind of 'public forum' issue, *cf. Widmar*, presented by [a] private crèche in [a] public park." *Id.* at 600 n.50 (citations omitted).

A distinction between government and private speech is surely necessary—the government has no right to keep a citizen from, for instance, draping himself in the flag or donning an Uncle Sam suit and carrying a placard proclaiming "America is a Christian Nation." It would not matter whether Uncle Sam was carrying his message on a public street, in a park or on the sidewalk in front of City Hall. If a permit is required for such an activity, it must be freely offered to the religious speaker on exactly the same terms as any other speaker, even if there is a risk that onlookers will think his speech is endorsed by the government.

The Establishment Clause prevents the government from treating religious speech more favorably than nonreligious speech. But both the Establishment and Free Speech Clauses prevent the government from treating religious speech less favorably. Because the district court found that the City of San Diego treated the Christmas Committee display just like any other type of speech, I join Judge O'Scannlain's excellent opinion affirming the judgment below.

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[1]When the government selectively adopts and promotes a private speaker's message, we treat the speech as the government's: "We turn next to the *county's* crèche display." *County of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989) (emphasis added). The district court's findings here refute any suggestion that San Diego gave the Christmas Committee's display a preference over anyone else's.

BOOCHEVER, Circuit Judge, dissenting:

San Diego has permitted a six-week, unattended, life-size display of eight scenes from the life of Jesus Christ and seven quotations from the New Testament to stand in the prominent Organ Pavilion of its Balboa Park. The City has waived over $18,000 annually in user fees for the private group sponsoring the display. San Diego has exempted the donation barrels and written requests for donations accompanying the display from its anti-solicitation ordinance. The City, which co-sponsored the display for 35 of the last 39 years, continues to award a permit to the Christmas Committee according to an unwritten, unannounced policy.

Despite the duration, size, history, and content of the display and the exemption of the Christmas Committee from the City's fee and anti-solicitation ordinances, the majority does not believe that a reasonable observer is likely to perceive that the City of San Diego endorses the display's Christian message. In what amounts to one paragraph of a lengthy opinion, the majority concludes that the Christmas Committee display does not have the primary effect of endorsing religion because Balboa Park is a traditional public forum removed from the seat of government. Dismissing the possibility of an Establishment Clause violation in this cursory manner erroneously implies that the Free Speech Clause trumps the Establishment Clause. Moreover, San Diego's unwritten, unannounced policy for awarding park permits is itself a violation of the Free Speech Clause because it gives government officials unbridled discretion over speech. Finally, viewing the evidence in the light most favorable to Kreisner, as we must on an appeal from summary judgment for the City, San Diego has in fact preferred the Christmas Committee display over another, first-in-time park permit application in violation of both the Establishment and Free Speech Clauses. Accordingly, I dissent.

I. *Standard of Review for Summary Judgment.*

The parties in this case submitted cross motions for summary judgment. We review the district court's decision to grant the City's motion for summary judgment *de novo*. *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570 (9th Cir. 1990). We also review *de novo* the decision to deny Kreisner's motion for summary judgment. *Mukherjee v. INS.*, 793 F.2d 1006, 1008 (9th Cir. 1986). Our task is to "determine, *viewing the evidence in the light most favorable to the opposing party*, if there is any genuine issue of material fact and whether the law was correctly applied." *Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986) (emphasis added).

Several facts surrounding San Diego's park permit application process remain disputed. As detailed in Section II.B, *infra*, at issue is whether the City has a first-come, first-served policy for issuing park permits, what information the City requires before it issues a permit, and whether the City in fact preferred the Christmas Committee's permit application over another, first-in-time application. The district court on remand arrived at conclusions to disputed questions after hearing contradictory testimony,[1] but the majority now accepts those

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[1]Based upon the testimony of Penny Scott, the District Manager of San Diego's Park and Recreation Department, and Jack Krasovich, the Deputy Director of the Central Division for the City of San Diego, the district court concluded that the City granted park permits on a first-come, first-served basis. This testimony, however, contradicted that of Janet Bergo and Betty Wheeler of the ACLU. The alleged policy was not documented or advertised. The district court's conclusion, therefore, was expressly based upon its assessment of witness credibility. District Court's Findings of Fact and Conclusions of Law 12/13/91 ("Findings") at 4-5, 9 (stating that district court found certain witnesses to be "credible" and reached its "Findings of Fact" after "considering all of the evidence and observing the demeanor of the witnesses"). Determinations of credibility are inappropriate for summary judgment. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992).

The district court also concluded from disputed evidence that the City "reasonably requires specific information regarding the display, such as size and dimension before issuing a permit." Findings at 5. The court reached this conclusion despite the absence of any requirement for such information in the City's permit applications or its Park and Recreation Rules and

conclusions using the clearly erroneous standard of review. The majority's decision to remand the case to the district court[2] does not alter its obligation to view the disputed facts in favor of Kreisner when reviewing the grant of the City's summary judgment motion. We have not had a full trial on the merits.

The majority justifies its departure from the long-standing rule of considering only undisputed facts in a review of summary judgment by declaring this an extraordinary case. The majority contends that because it remanded the case for an evidentiary hearing on particular issues, we must apply the clearly erroneous standard to the factual findings made in the evidentiary hearing. This argument misapprehends the nature and purpose of the remand order.

The majority's remand order instructed the district court to make factual findings on San Diego's policies for issuing permits for the use of Balboa Park and on any other developments which the parties regarded as "material to the issues in this appeal." We amended the order to allow the district court to "amend its conclusions of law in light of any new factual findings."[3] The issue on this appeal, of course, is whether

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Regulations. Once again, therefore, the district court based its conclusion on the credibility of the City's witnesses.

[2]The majority's decision to remand the case to the district court for further factual findings itself suggests that the district court's granting summary judgment in favor of the City was inappropriate. A genuine issue of material fact must have existed to warrant an additional factual inquiry.

[3]We remanded this case to address the City's assertion, raised for the first time at oral argument before this court, that it had a first-come, first-served policy for issuing park permits. The full text of the amended order remanding the case to the district court is as follows:

> Submission is VACATED until further order of the court.
>
> This appeal is REMANDED to the district court for sixty days from the date of this order for the limited purpose of making further factual findings. Specifically, the district court shall determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. The court shall attach

granting summary judgment to the City and denying summary judgment to Kreisner was proper. Had the majority chosen to remand the case for trial on the issue of whether San Diego had a first-come, first-served permit policy, it could have affirmed a partial summary judgment for the City on all but this issue. A full trial would have ensued on the issue of the City's permit policy, and an appeal from the district court's findings on the underlying disputed factual issues would then be reviewed for clear error as we would no longer have before us a case of summary judgment. We did not, however, follow this course. Instead, we chose to preserve the summary judgment question on this appeal. In opposing the City's motion for summary judgment, therefore, Kreisner's obligation on remand was to establish that a genuine dispute existed over San Diego's permit policies. The district court on remand reiterated the conclusion of the original district court that the City was entitled to summary judgment.

We are therefore faced with reviewing the factual findings underlying a second district court's order of summary judgment. "[The] limited purpose [of findings of fact in a district court's order of summary judgment] is to pinpoint the *undisputed* facts supporting the summary judgment, not to weigh the evidence in the record." *Swarner v. United States*, 937 F.2d 1478, 1481 (9th Cir. 1991) (emphasis added). *Carter v.*

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to its findings copies of any documents setting forth such policies. If it is contended that there are oral or partially oral policies, the court shall specify any evidence indicating the establishment of such policies and any evidence indicating that the public has been made aware of such policies. The court may make any further findings on factual developments which the parties regard as material to the issues in this appeal. The district court also may amend its conclusions of law in light of any new factual findings.

Upon receipt of the order making further factual findings and (if applicable) amending the conclusions of law, the clerk shall immediately deliver copies of such order to this panel.

Judge Boochever dissents from the order of remand and would decide the case on the present record before the panel.

SUBMISSION VACATED and TEMPORARILY REMANDED.

McCarthy, 806 F.2d 1373, 1375 (9th Cir. 1986), which the majority cites in support of its position, is simply inapplicable. *Carter* states the rule that we review a magistrate's findings of fact underlying the denial of a petition for writ of habeas corpus and a district court's adoption of such findings for clear error. *Id.* at 1375. *Carter* was not a case of summary judgment. Indeed, no Ninth Circuit case has applied a clearly erroneous standard of review to a district court's factual findings, on remand or otherwise, underlying an order of summary judgment. Accordingly, until the factual disputes in this case are resolved at trial, we must view them in the light most favorable to Kreisner for purposes of reviewing the grant of the City's summary judgment motion.

II. The Establishment Clause.

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ("*Allegheny County*"), instructs us to apply the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether a private religious display on public property violates the Establishment Clause. "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Id.* at 592. The majority's conclusion that San Diego's permitting the Christmas Committee display was not "motivated wholly by an impermissible purpose," *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988), is arguable. It is also arguable that this case does not reflect the type of "enduring entanglement" present in *Lemon*, 403 U.S. at 615-22. I disagree entirely with the majority, however, insofar as they fail to find at least a triable issue under the primary effect prong of the *Lemon* test.

A. *Kreisner's Motion for Summary Judgment.*

1. *Undisputed Facts.*

In reviewing the district court's denial of Kreisner's motion for summary judgment, we examine the facts in the light

most favorable to the City. No genuine issue of material fact is presented regarding the duration, size, or content of the Christmas Committee's display or its prominent location in the City-owned Organ Pavilion. Also undisputed is San Diego's historical co-sponsorship of the display, the fact that the display is unattended, and the exemption of the display from the City's fee and anti-solicitation ordinances. We may consider these undisputed facts in determining whether the primary effect of the City's granting a permit for the Christmas Committee display advances religion.

2 *Religious Displays Under the Establishment Clause.*

"When evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" *Allegheny County,* 492 U.S. at 597 (opinion of Blackmun, J.) (quoting *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 390 (1985)). The scope of our inquiry encompasses not only the government's current practice, but also the "'history and ubiquity'" of that practice. *Id.* at 630 (O'Connor, J., concurring) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). The analysis admittedly is fact-intensive since "'[e]very government practice must be judged in its unique circumstances.'" *Id.* at 595 (quoting *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring)).

Beyond these broad proclamations, the jurisprudence surrounding the constitutionality of private religious displays on public property is splintered. In this evolving area of the law, we continue to grope for a sensible and practical framework with which to analyze the myriad factual permutations that confront us. After examining the various decisions regarding the constitutionality of religious displays, I conclude that the analysis can be organized around two principal questions. Although the cases do not specifically so hold, I believe that whether a religious display on public property has the primary effect of advancing religion in violation of the *Lemon* test

is a function of the interplay between (1) the intensity of the religious message and (2) the nature of the government's association with that message. Essentially, this interplay involves a sliding scale: the more intense the religious message, the less associated the government needs to be with that message to violate the Establishment Clause. Conversely, the less intense the religious message, the closer the government may be associated without crossing the divide between church and state. Approaching the caselaw using this analytical framework helps to tame the factors that courts have found significant in determining the constitutionality of religious displays.[4]

a. *Intensity of the Religious Message.*

The intensity of the religious message is a function of (1) the religious potency of the display itself; (2) whether secular symbols accompany the display; (3) whether the display is sectarian or plural; and (4) the size and duration of the display. Regarding the religious potency of the display itself, a creche depicting the Christian nativity scene, for instance, would be considered more potent than the display of a Christmas tree. *Compare Lynch,* 465 U.S. at 711 (Brennan, J., dissenting) ("[A] nativity scene represents far more than a mere 'traditional' symbol of Christmas. The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah.") *with Allegheny County,* 492 U.S. at 616-17 ("The Christmas tree, unlike the menorah, is not itself a religious symbol. ... Numerous Americans place Christmas trees in their homes without subscribing to Christian religious be-

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[4]Although the majority characterizes this approach as a new Establishment Clause test, I emphasize that I do not intend to replace the *Lemon* test but merely to refine the "effects" prong of *Lemon* in the limited context of judging the constitutionality of religious displays on government property. I believe my characterization of this approach finds support in the Establishment Clause jurisprudence as is evident in my citations throughout this discussion.

liefs ..."). Thus, the more religiously potent the display, the more intense is the religious message conveyed.

A display unaccompanied by secular symbols also conveys a more intense religious message than does a religious display which is part of a larger secular presentation. In *Lynch*, for instance, the creche was surrounded by, "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" 465 U.S. at 671. Justice O'Connor's concurrence concluded that the secular setting "'change[d] what viewers may fairly understand to be the purpose of the display' and 'negate[d] any message of endorsement' of 'the Christian beliefs represented by the creche.'" *Allegheny County*, 492 U.S. at 596 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). *Compare Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) (menorah "was displayed alone so that there was nothing to indicate that the thrust of its message was secular rather than religious"), *cert. denied*, 496 U.S. 926 (1990).

Furthermore, a display that represents the beliefs of a particular religious denomination conveys a more intense religious message than a display that "convey[s] a message of pluralism and freedom of belief during the holiday season." *Allegheny County*, 492 U.S. at 635-36 (O'Connor, J., concurring) (although creche standing alone was unconstitutional, menorah standing next to Christmas tree was constitutional because "[a] reasonable observer would ... appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens").

Finally, a religious display that is large and long-standing more intensely communicates a religious message than a smaller, more temporary display. "[A] private religious group may so dominate a public forum that a formal policy of equal

access degenerates into endorsement. ... Surely the City cannot allow a religious group to turn a public park into an enormous outdoor church." *Doe v. Small*, 964 F.2d 611, 625 (7th Cir. 1992) (en banc) (Cudahy, J., concurring); *see also Allegheny County*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting) ("I doubt not ... that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. ... Such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."). Considering a display in light of these factors conveys a sense of the intensity of the religious message conveyed.

b. ***Nature of Government's Association with the Religious Message.***

The second principal inquiry, the nature of the government's association with the religious message, depends upon (1) the ownership of the display; (2) the ownership of the display's location; (3) the historical sponsorship of the display; (4) the extent to which the display is surrounded by government symbols; and (5) whether the display is unattended. Clearly, where the government owns the display itself, the government is closely associated with the content of the display. Where the display is privately owned but the government owns the property on which the display stands, the government still associates with the display's message, although to a somewhat lesser degree. *See Allegheny County*, 492 U.S. at 600; Kaplan, 891 F.2d at 1028. This association, however, is strengthened when the government sponsored the display for many years. *See Allegheny County*, 492 U.S. at 630 (O'Connor, J., concurring).

The government's association with a private religious display becomes more pronounced when the display's location is not only government-owned, but also symbolic of government itself. Thus, a religious display on the grand staircase of the county courthouse, *Allegheny County*, 492 U.S. at 579-80, or within sight of city hall, *Kaplan*, 891 F.2d at 1029, or in front of a county building, *Smith v. County of Albemarle*, 895 F.2d 953, 954 (4th Cir.), *cert. denied*, 498 U.S. 823, 111 S. Ct. 74 (1990),

symbolically is more closely associated with the government than a display located on unadorned government land.

Finally, where the private religious display is unattended, the government is more closely associated with the content of the display than if the display were attended. The reasonable observer of a religious display might naturally question whether the government subscribes to the religious message. When a private party actively and personally participates in a display, the passerby can readily attribute the religious message to a private citizen and thereby disassociate the government. Thus, the evangelist who preaches in a public park is less likely to be associated with the government than would an unattended display conveying the same sermon. Although a sign disclosing the owner of the religious display may help diffuse the misconception of government sponsorship, such a sign, by itself, will not negate the perception of government support for the unattended display. *See Allegheny County*, 492 U.S. at 600-01; *Smith*, 895 F.2d at 958 ("It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion.").

c. ***The Sliding Scale between Religious Intensity and Government Association.***

Once we assess the intensity of the religious message and the nature of the government's association with that message, the inquiry turns to the interplay between these two factors. I believe the caselaw may be construed to support the characterization of this interplay as a sliding scale.

In *Allegheny County*, for example, the Court drew a line between the creche depicting the Christian nativity scene, which was held unconstitutional, and the menorah/Christmas tree display, which was held constitutional. In both instances, the government association with the display remained relatively constant: both displays were privately-owned, unattended, and located at the county courthouse, a structure symbolizing government. 492 U.S. at 578-79. The constitutional difference between the displays lay in the intensity of their religious messages. The creche was a potently religious display with a

distinctly denominational, Christian message. Its manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo!," meaning "Glory to God in the Highest." *Id.* at 580 & n.10. No secular symbols accompanied the creche. *Id.* at 580. The display stood for over six weeks, from late November to early January. *Id.* The menorah, on the other hand, was erected next to a Christmas tree. Although the menorah was a potently religious symbol of the Jewish faith, the combined display was expressly non-denominational. *Id.* at 635 (O'Connor, J., concurring). Furthermore, the City's sign accompanying the display stressed the secular theme of "liberty and pluralism."[5] *Id.* Finally, the menorah stood for just over three weeks, from late December to mid-January. *Id.* at 587. Clearly, given the holding of the case, the government's association with the message of the menorah/Christmas tree display was tolerable, but the government was too closely associated with the more intense religious message of the creche.

Similarly, other cases suggest that where the intensity of the religious message is constant, the constitutionality of a private religious display will turn on the nature of the government's association with the display. In *Chabad-Lubavitch of Georgia v. Miller,* 976 F.2d 1386 (11th Cir. 1992), the Eleventh Circuit held that permitting a private group to erect a menorah in the rotunda of the state capitol would violate the Establishment Clause. The Sixth Circuit, on the other hand, denied a motion to enjoin a private religious group from erecting a menorah in a public square in Cincinnati because it determined that such a display would be constitutional. *Congregation of Lubavitch v. City of Cincinnati,* 923 F.2d 458 (6th Cir. 1991). The court distinguished the case from those situations in which the location of the display is close to symbols of government, holding that the Cincinnati square had "no connection with any government buildings or function." *Id.* at 459-60. Thus, where religious displays of identical intensity are involved, the Establishment Clause may be violated where

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[5]The sign read: "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.*

the government has a relatively close association with the display, and not violated where the association is more remote. Taken together with *Allegheny County*, I believe these cases, while not articulating such an approach, support my characterization of the interplay between the intensity of the religious message and the nature of the government's association with that message as a sliding scale.

The majority advances three arguments against the sliding scale test. First, the majority asserts that inquiring into the intensity of a religious message is similar to evaluating the centrality of a particular belief or practice to a faith, which is prohibited in analyzing a case under the Free Exercise Clause. Second is the concern over whose perspective we use to determine intensity. Third, the majority contends that the consequence of the sliding scale analysis would be to dilute the religious messages allowed in public forums. These concerns are overstated.

Evaluating to what degree a message is religious differs from determining whether a belief or practice is central to a faith. The former inquiry merely asks what is being communicated, a question that courts face daily in such contexts as defamation and contract. Indeed, if we were prohibited from asking whether a message is religious, then we could never ask whether the government endorsed a religious message. In such a world, we would have no Establishment Clause.

Moreover, the Supreme Court has recognized that the intensity of a religious message is a necessary inquiry under the Establishment Clause. *See* discussion of *Allegheny County, supra.* It is the variation in the intensity of the religious message that explains why a Christmas tree display was permitted in this very courthouse during the month of December when a creche in the same location would have been impermissible. *See Allegheny County,* 492 U.S. at 579-80 (creche displayed on grand staircase of county courthouse violated the Establishment Clause).

Regarding the question of perspective in judging the intensity of a religious display, I would not depart from the

"reasonable observer" standard that we use in current Establishment Clause jurisprudence, and many other contexts for that matter. As the Court stated in *Allegheny County*, we must examine a display from the perspective of both adherents and nonadherents of the controlling denominations. *Id.* at 597 (opinion of Blackmun, J.). Although the majority criticizes the sliding scale approach because it allegedly lacks "manageable standards to apply in making these sensitive judgments," Opinion at ___, I note that the same problem, if a problem at all, inheres in the current jurisprudence when evaluating whether government endorses a religious belief. From the perspective of the reasonable observer, courts have determined that a Santa Claus display is non-religious, but a menorah display is religious. *Compare Lynch,* 465 U.S. at 671 (Santa Claus display considered part of secular presentation) *with Kaplan,* 891 F.2d at 1029 (thrust of menorah display was religious message). Apparently, we have managed to overcome the difficulties associated with the question of perspective.

Finally, the majority's conclusion that the sliding scale test would result in only diluted religious messages being allowed in public forums is oversimplified. Only intensely religious displays that are closely associated with the indicia of government are disallowed. In fact, one could rephrase the majority's concern as follows: the sliding scale test would allow government to appear to endorse only diluted or non-religious messages, but not intensely religious messages. I believe this is precisely the result the Establishment Clause was intended to achieve.

3. *The Christmas Committee Display.*

Applying these principles to the present case, I conclude that the Christmas Committee display is unconstitutional and that Kreisner is entitled to summary judgment under the Establishment Clause. The religious intensity of the display's

message is unprecedented.[6] First, the display itself is po tently religious and sectarian. The display's eight booths are drawn from the New Testament's account of the life of Christ. The first scene depicts "The Annunciation," the sacred moment in Christian theology when, in the Gospel according to Luke, the Angel Gabriel informs the Virgin Mary that she will be the mother of God on earth. In the second scene, the expectant Mary and Joseph are being turned away at the Inn in a scriptural moment that represents mankind's hostile reception of Christ. The third scene portrays the humble shepherds' immediate acceptance of the divinity of Christ. The fourth scene depicts the actual birth of Christ, which, when taken in the context of the parable, is a patently religious, rather than historical, moment. The fifth scene, portraying the three wise men in their journey to Bethlehem, "reflects the early [Christian] church's experience of the Gentiles' readiness to accept the gospel and the disappointing slowness of all Israel to receive it." Daniel J. Harrington, *Collegeville Bible Commentary: The Gospel According to Matthew* 17 (1983). The sixth scene depicts Mary, Joseph, and the newborn Christ fleeing from Herod, implicitly denoting "Jesus as the new Moses." Hans Kung, *On Being a Christian* 451 (Edward Quinn

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[6]Photographs of the Organ Pavilion and two booths representative of the display are included in the Appendix to this dissent.

I have found only one case, *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc), involving a display which can even remotely approximate the religious intensity of the display in this case. *Doe* involved the exhibition of a series of religious paintings in a public park. Unlike the case at issue here, however, *Doe* did not involve life-size sculptures or a prominent display of passages from Christian scripture. In addition, the public park in which the display in *Doe* was located was unadorned with government-owned buildings or structures. Id. at 613.

Doe is also distinguishable because the court never addressed whether the religious display at issue violated the Establishment Clause. *Id.* at 617, 622 (parties did not appeal Establishment Clause issue). Indeed, the *Doe* court was "not in agreement as to whether the City violated the Establishment Clause in its conduct." *Id.* at 617. Hence, to the extent that the religious paintings in *Doe* are similar to the religious display in this case, the result in *Doe* cannot be considered even as persuasive authority on the Establishment Clause question.

trans., 1976) (emphasis omitted). The seventh scene shows "Christ in the Temple," the moment when the religious mission of Jesus was first announced. *See Harper's Bible Dictionary* 1029 (Paul J. Achtemeier ed., 1985). The eighth and final scene portrays Christ as an adult teacher, with young children drawing near to hear Christ's lesson.

Not only does the display contain potent religious imagery, it also presents a series of passages from the New Testament. Thus the religious message becomes quite literal. Indeed, the seven scriptural quotations magnify the significance the Court attached to the single Latin phrase in *Allegheny County*. There, the Court explained that "this praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service." *Allegheny County*, 492 U.S. at 598.

Second, no secular symbols accompany the Christmas Committee display. The nearest secular symbols of the season reside in another area of the park separated by a wall, landscaping, and a road. The eight religious booths are indisputably their own display so that "[t]he presence of Santas or other Christmas decorations elsewhere ... fail[s] to negate the endorsement effect" of the display. *Id.* at 598-99 n.48. In fact, the Christmas Committee itself declares that the display is motivated by its "desire to present a non-commercial celebration of the true 'Spirit of Christmas.'"

Third, the display contains no symbols of other, non-Christian religions. Finally, the display is large and enduring. Each of the eight booths contains life-size figures, with the display occupying both sides of the stage in the Organ Pavilion. The City permits the display to remain there for six weeks.

In summary, no court has been presented with a display of such blatant, denominational, and conspicuous religious intensity—a display which the majority characterizes as conveying an "overwhelming message of glorification of the divinity of Jesus Christ." Opinion at ___.

Considering the intensity of the religious message, virtually any government association with the Christmas Committee display would break with the principles announced in the Establishment Clause. Admittedly, the symbols of the government's association with the display may not be as pervasive as in *Allegheny County* or other cases in which the displays were located in the "seat of government." Nevertheless, the undisputed facts in this case reveal that San Diego's association with the display is more than incidental.

The ownership of the display is private, but the property on which the display rests is owned and maintained by San Diego's taxpayers. The City has an historical involvement with the display. Prior to 1988, City employees erected, removed, and stored the display each year. Moreover, the property is adorned with structural symbols of government. Surrounding the Organ Pavilion in Balboa Park are the United Nations Building, the Hall of Nations, the House of Pacific Relations, the Museum of Man, the San Diego Museum of Art, the Space Theater and Science Center, and the Natural History Museum. The Organ Pavilion itself is a massive, ornate, semi-enclosed structure. The pavilion's columns, arches, and elevated stage provide the backdrop for the display. This is not merely a religious exhibit isolated from indicia of city sponsorship. With eight large booths flanking both sides of the Organ Pavilion's center stage, the display appears to be an integral part of the City-owned structure. No reasonable observer could visit the Christmas Committee display without sensing the government's presence. Furthermore, the display is unattended.[7] None of the Christmas Committee's members remains with the display to help diffuse the government's association with the religious message. Accordingly, the reasonable observer could easily take the government's presence to be the government's endorsement of the display. In light of

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[7]Although it is contended that the display contains a disclaimer sign attributing its sponsorship to the Christmas Committee, the content of the sign does not appear in the record. As noted earlier, however, such a sign cannot dissolve the perception of government support for the religious message of the display.

the unprecedented religious intensity of this display, the real and symbolic association between San Diego and the religious message conveyed violates the Establishment Clause.

Any remaining doubts of an Establishment Clause violation are shattered when one considers the City's exemption of the Christmas Committee display from its fee regulations and anti-solicitation ordinance. Ordinarily, the City's park regulations require a non-profit or charitable organization to pay $440 per day for use of the Organ Pavilion, provided that the organization does not charge admission to members of the public who attend the function. The City waives the fee only for "a nonprofit community service agency or organization." Such an organization is defined as "[a] recognized group, club, agency, or organization whose activities are of a *service or character building nature,* who give service *to the community as a whole,* and a group where no portion of the net earnings are used for or inure to the benefit of any individual or member of the group" (emphasis added).

The City argues, and the majority asserts, that the regulations require payment of user fees only for "exclusive use" of the Organ Pavilion and that the Christmas Committee display is a "non-exclusive use." Although San Diego has few written regulations governing its park permit application process, it does have a detailed, written policy governing park fees and fee waivers. Nowhere in that policy does the City ever mention exclusivity as a prerequisite for imposing fees or "non-exclusive" use as a criterion for a fee waiver. This is yet another example of the City's ad hoc approach to administering park permits, discussed in Section II.B, *infra*. I cannot join the majority in reading an exclusivity requirement into the City's user fee regulations or in sanctioning the City's departure from its own written fee policy. Indeed, it is the opinion of the City Attorney's office itself that the City's fee waiver is unconstitutional.

I agree with the City Attorney's office that allowing the Christmas Committee to forego paying more than $18,000 in fees per year violates the Establishment Clause. It is questionable that the Christmas Committee is a "service or character

building" organization, other than in the sense that any religious denomination considers itself to further such goals. It is unquestionable that the Christmas Committee's intensely sectarian message does not serve "the community as a whole." Indeed, the record shows that every other religious organization who used the Organ Pavilion between September 1987 and September 1989 paid a user fee.[8] Standing alone, San Diego's conferring this unusual annual economic benefit only upon the Christmas Committee constitutes an unconstitutional endorsement of religion. *See Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. ... [T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.").

Finally, the City's exempting the Christmas Committee from its anti-solicitation ordinance further manifests an endorsement of religion. A regulation and municipal ordinance both prohibit solicitation in San Diego's public parks. Nevertheless, the City permits the Christmas Committee to place donation barrels and fliers soliciting contributions at the display.

The City maintains that these barrels and fliers do not meet its definition of "solicitation." The relevant ordinance defines "solicitation" to "mean and include ... any direct oral or written request for money, property, or anything of value or any financial assistance of any kind." San Diego's claim is specious given this definition. The flier asks visitors to "Help Us Keep the Community Christmas Center Going!" and explains that "to insure the continuing operation of the

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[8]The only possible exception is a fee waiver given to St. Augustine High School for a concert on May 6, 1989. This fee waiver, however, was consistent with waivers given to the other high schools who held concerts throughout the two-year period.

Community Christmas Center, voluntary contributions are essential." The flier goes on to request that visitors make their checks payable to the Christmas Committee Center in pre-selected "membership categories" of $10, $25, $50, and $100. It concludes by instructing contributors to put the donations in the barrels or mail them to a given address. I find it difficult to imagine a more "direct ... written request for money."

We should order that summary judgment be granted to Kreisner based upon the undisputed facts. "[T]he Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message." *Allegheny County*, 492 U.S. at 601.

B. *The City's Motion for Summary Judgment.*

For the same reasons that Kreisner is entitled to summary judgment, we should reverse the summary judgment for San Diego under the Establishment Clause based on the undisputed facts. The disputed facts, however, present additional reasons for reversing the City's summary judgment.

The parties agree on, or do not deny, the following facts pertaining to the City's park permit application practice. At oral argument before this court, counsel for San Diego represented for the first time in this appeal that the City grants park permits for long-term, unattended displays on a first-come, first-served basis. Betty Wheeler, Legal Director of the ACLU in San Diego, attended the oral argument. Wheeler was surprised by the City Attorney's representations. She had worked regularly with attorneys and others whom she thought would be familiar with the City's alleged first-come, first-served policy, yet neither she nor any of the colleagues she contacted were aware of such a policy.

Wheeler decided to test the veracity of the City's representations.[9] The bicentennial celebration of the signing of the Bill

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[9]The majority suggests that Kreisner and the ACLU inappropriately "create[d]" issues of material fact after the district court's grant of summary

of Rights would occur in December 1991, and Wheeler thought that a month-long, unattended display in the Organ Pavilion during December would both commemorate the event and test the City's policy.[10] Wheeler instructed Janet Bergo, an administrative assistant for the ACLU, to hand-deliver a letter to the City's Park and Recreation Department and to obtain a permit for the display. The letter requested use of the area in the Organ Pavilion where the Christmas Committee display had traditionally been located. The letter also explained the time frame and content of the display, which would consist of "a series of panels illustrating the rights guaranteed to Americans by the Bill of Rights." It noted that "the panels would not block the view of the stage, or otherwise physically preclude other uses of the Organ Pavilion." Wheeler attempted to draft the letter so that it clearly fell within the permit policy as the City Attorney had described it at oral argument. She even used the term "non-exclusive use permit" which had been used by the City Attorney.

Bergo delivered the letter to and met with Penny Scott, the City's district manager for Balboa Park, on April 4, 1991. Bergo showed Scott a poster illustrating what the panels would look like. Scott was genuinely enthusiastic about the display until she realized that it might conflict with the Christmas Committee display. Scott said that she wanted to know "more details about how [the display] would look" and that she

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judgment. I disagree. That San Diego had a first-come, first-served policy for issuing park permits for long-term, unattended displays was first asserted by the City at oral argument before this court. Thus, if any party "created" the issue, the City did. Indeed, the majority instructed the district court on remand to "make any further findings *on factual developments* which the parties regard as material to the issues in this appeal (emphasis added)." Accordingly, the district court appropriately heard testimony regarding the City's purported first-come, first-served policy and the ACLU's experience suggesting that no such policy existed.

[10]The majority's statement that "the ACLU had no intention of erecting such a display" conflicts with Ms. Wheeler's sworn statement that she obtained a commitment from her executive director to put on the display if the ACLU were awarded the permit. At minimum, Ms. Wheeler's testimony presents a triable issue of fact.

"needed to talk to her boss or the city attorney to work this out." Bergo asked whether the ACLU would be able to have the location requested for the display. Scott responded that the Christmas Committee's display was "always there."

Bergo telephoned Scott later that same day. The parties disagree over the content of this telephone conversation. We must therefore accept Kreisner's account of the conversation in reviewing the grant of the City's summary judgment motion.

According to Kreisner, Bergo clarified during her telephone conversation with Scott that the size of the display would be the same as that of the Christmas Committee display. Scott responded that both the ACLU's requested display and the Christmas Committee display could not possibly be at the same location simultaneously. Bergo asked whether the requested location had already been reserved. Scott responded, "Oh, yes, the Nativity scenes have come back for 20 to 25 years. It's already booked. They will be there every year until they decide not to do it again." In fact, the Christmas Committee did not request the Organ Pavilion until September 1991, almost five months later. Bergo then asked how soon she would need to contact the City about reserving the location for the next year. Scott again replied that the Christmas Committee was "always there."

The majority accepts the district court's conclusion that the ACLU's permit application ultimately was rendered inactive because it lacked "specifics." The only "specific" that was ever mentioned was the size of the display. However, after Bergo's April 4 telephone conversation with Scott, it appears, accepting Kreisner's account of the conversation, that Scott understood how large the ACLU display would be. When Bergo told Scott that the display would be the same size as the Christmas Committee's display, Scott responded, "Oh, my god, those things are booths; they're over your head; those are really big." Indeed, Scott knew precisely that this meant each display would be 12 feet square. These were virtually the same dimensions that Wheeler provided to Scott in her October 2, 1991, follow-up letter. Oddly, this letter, mailed *af-*

ter the City had granted the permit to the Christmas Committee, satisfied Scott's "need" for specifics, but the same information provided *before* the Christmas Committee received its permit would not suffice.

The remaining series of events surrounding the ACLU's permit application are undisputed. Bergo again contacted Scott by telephone in July 1991 to ask whether the ACLU's permit had been granted. Scott responded that she needed some information and had taken no action. Wheeler also wrote to Scott in October 1991 inquiring about the status of the permit application. Scott responded in writing that the ACLU's permit application had been deemed inactive because it lacked the necessary specifics. She also stated that the Christmas Committee had been given the location that the ACLU had previously requested.

Considering these facts in the light most favorable to Kreisner, as we must, it becomes even clearer that the district court's grant of summary judgment to the City was improper. Whether the City in fact had a first-come, first-served policy for long-term, unattended displays, whether the City embellished the policy with ad hoc requests for "specifics," and whether the City favored the Christmas Committee's application over the ACLU's first-in-time application at minimum are triable issues of material fact. If we assume Kreisner's version of the disputed facts, San Diego reserved the Organ Pavilion for the Christmas Committee display despite the ACLU's first-in-time application, and used its request for "specifics" as a subterfuge to render the ACLU's application inactive.

Although there may be room to debate the meaning of the Establishment Clause at its fringes, the core of its protection remains indubitable: the government can "effect no favoritism among [religious] sects or between religion and nonreligion." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *accord Allegheny County*, 492 U.S. at 590 ("This Court has come to understand the Establishment Clause to mean that government ... may not discriminate among persons on the basis of their religious beliefs and practices. ..."); *Texas Monthly, Inc. v. Bullock*, 489 U.S.

1, 27, 28 (1989) (Blackmun, J., concurring in judgment) ("government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas"); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) ("preference" for particular religious belief constitutes an endorsement of religion); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (Establishment Clause "precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred"). A finding that the City played favorites in reserving the Organ Pavilion for the Christmas Committee over the ACLU, therefore, would constitute an independent basis for concluding that San Diego has violated the Establishment Clause.

III. The Free Speech Clause.

Besides forbidding the government from making laws respecting the establishment of religion, the First Amendment also prohibits the government from making laws "abridging the freedom of speech." U.S. Const. amend. I. Two doctrines that emerge from this clause are relevant to the case at hand. First, the public forum doctrine allows content-based regulation of speech in a public forum only where the "regulation is necessary to serve a compelling state interest and ... is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). The majority holds that this doctrine permits, and possibly requires, San Diego to allow the Christmas Committee display. Preventing San Diego from violating the Establishment Clause, however, is a compelling state interest, and an injunction in this case is necessary to achieve that end. Second, the prior restraint doctrine prohibits giving government officials unbridled discretion in licensing speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988). I believe that the City's informal policy of awarding park permits gives park officials unbridled discretion to discriminate against speech in violation of the Constitution.[11]

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[11]Although the factual issues underlying the prior restraint doctrine were addressed by the district court on remand and argued by the parties in the supplemental briefing to this court, Kreisner, who appeared *pro se* in the

A. *The Public Forum Doctrine.*

For purposes of analyzing whether the Free Speech Clause is violated, the Supreme Court uses the categories of traditional public, designated public, and non-public forum to determine whether government may prohibit speech in a particular location. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A traditional public forum is a place, such as a public street or park, which has "'immemorially

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original proceedings, did not state his case in terms of the prior restraint doctrine until he, when represented by counsel, filed his supplemental reply brief.

Whether the City had unbridled discretion to issue park use permits is integral to analyzing whether the City in fact favored the Christmas Committee display over that of the ACLU in violation of the Establishment Clause. Furthermore, the unbridled discretion inquiry coincides with whether the City provides equal access to speech under the Free Speech Clause. Therefore, whether the City exercised unbridled discretion over speech was implicitly at issue before the district court. Kreisner contended that the City had no articulated standards for issuing permits, and the parties had "an opportunity to dispute the facts material to that claim." *Fountain v. Filson*, 336 U.S. 681, 683 (1949). Moreover, the issue is inextricably intertwined with the City's and the majority's free speech justification.

To the extent that the prior restraint doctrine is considered an issue not presented to the district court, we have held that "[e]xceptional cases or particular circumstances may prompt a reviewing court, *where injustice might otherwise result or where public policy requires*, to consider questions neither pressed nor passed upon below." *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) (emphasis added). Justice and public policy require that we determine whether San Diego's permit application process is an unbridled prior restraint of speech:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Designated public forums are public properties "which the State has opened for use by the public as a place for expressive activity." *Id.* A non-public forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 46. In both the traditional and designated public forums, a regulation excluding speech based on content must be narrowly drawn to achieve a compelling state interest. *Id.* at 45, 46.

There is no question that the Christmas Committee display would be unconstitutional if it stood within a county courthouse or in front of City Hall. In both cases, the display would violate the Establishment Clause. *See Allegheny County*, 492 U.S. at 579; *Kaplan*, 891 F.2d at 1029. Although the majority avoids reaching the issue, preventing such a violation is a compelling state interest which justifies a content-based regulation forbidding such a display, thereby satisfying the standard announced in *Perry. Widmar*, 454 U.S. at 271 (state University's interest "in complying with its constitutional obligations may be characterized as compelling"). The question is whether placing the same display in the Organ Pavilion of San Diego's Balboa Park alters the legal outcome.

In holding that "because the [Christmas Committee] display is private speech in a traditional public forum removed from the seat of government it does not have the primary effect of advancing religion," Opinion at ___, the majority frames its Establishment Clause discussion in terms of public forum doctrine and thereby suggests that the resolution of an Establishment Clause challenge is dependent on the resolution of the public forum issue—in other words, that the Free Speech Clause trumps the Establishment Clause. The concurrence brings this point into sharp relief. According to the concurrence, "[r]eligious speech is *speech*, ... no more and no less." Judge Kozinski, concurring, at ___. This statement ignores the Establishment Clause. As Justice Kennedy wrote for

the majority in *Lee v. Weisman*, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992):

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. ... In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. ... [T]he Establishment Clause is a *specific prohibition* on forms of state intervention in religious affairs *with no precise counterpart in the speech provisions.* The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

Id. at 2657-58 (citations omitted) (emphasis added). Accordingly, although "[t]he government has many good reasons for restricting racist speech, advocacy of Communism, pornography and various other kinds of speech that some might see as harmful," Judge Kozinski, concurring, at ___, the government does not have the reason that the Constitution expressly forbids the government from appearing to endorse those kinds of speech. The Constitution does, however, forbid the government from appearing to endorse religious speech.[12]

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[12]The concurrence challenges this sentence, arguing that the Establishment Clause "forbids only the establishment of religion, not the mere appearance of doing so." Judge Kozinski, concurring, at ___. The Supreme Court clearly supports my reading of the content of the Establishment Clause. *Allegheny County*, 492 U.S. at 574 ("The [Establishment] Clause, at the very least, prohibits government from *appear-*

The principle, therefore, is clear: a violation of the Establishment Clause can never be saved by the Free Speech Clause. Otherwise, the Establishment Clause would be emasculated.

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ing to take a position on questions of religious belief . . . .") (emphasis added); *id.* at 595 ("[T]he question is 'what *viewers may fairly understand* to be the purpose of the display.'") (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)) (emphasis added); *id.* at 597 ("We must ascertain whether 'the challenged governmental action is sufficiently likely to be *perceived* by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'") (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)) (emphasis added); *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 264 (1990) (Marshall, J., concurring) ("If public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause.") (emphasis added); *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("It is only practices having [the effect of communicating endorsement or disapproval of religion], whether intentionally or unintentionally, that make religion relevant, in reality *or public perception*, to status in the political community.") (emphasis added); *id.* at 711 (Brennan, J., dissenting) ("But when [government] officials participate in or *appear* to endorse the distinctively religious elements of this otherwise secular event [Christmas], they encroach upon First Amendment freedoms.") (emphasis added); *Widmar*, 454 U.S. at 280-81 (Stevens, J., concurring) ("But since the record discloses no danger that the University will *appear* to sponsor any particular religion, . . . the Court properly concludes that the University's fear [of an Establishment Clause violation] is groundless.") (emphasis added).

Moreover, although the concurrence asserts that the endorsement test applies only to situations where "the government is speaking," Judge Kozinski, concurring, at __, *Allegheny County* rejects such a narrow interpretation of the Establishment Clause. 492 U.S. at 600 ("[T]he Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communication by religious organizations. Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message." (citation omitted)). Accordingly, even though the creche in *Allegheny County* was owned and displayed by the Holy Name Society, a private Roman Catholic group, *id.* at 573, the Court found an Establishment Clause violation because observers were sufficiently likely to perceive the display as government endorsement of a religious message. *Id.* at 597, 601.

I agree with the majority that the Organ Pavilion is a traditional public forum. The nature of a display's forum, however, "is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Kaplan*, 891 F.2d at 1029; *accord Smith*, 895 F.2d at 958 ("[W]hether the lawn is or is not a public forum is not dispositive. The critical gauge of any such content-related speech restriction is whether the overall context and nature of the restricted display conveys the impermissible message of governmental endorsement of religion." (footnote omitted)).

Thus the critical question remains whether San Diego's relationship with the Christmas Committee display violates the Establishment Clause. Having found an Establishment Clause violation, I conclude that a content-based injunction against the display does not offend the public forum doctrine. Holding the government to its obligations under the Establishment Clause constitutes a compelling state interest. Moreover, a prohibition limited to long-standing displays of solitary religious symbols on public property adjoining prominent city structures would be narrowly tailored to serve this interest. *See Smith*, 895 F.2d at 960; *Kaplan*, 891 F.2d at 1030. Accordingly, the Free Speech Clause is satisfied.

B. *The Prior Restraint Doctrine.*

San Diego's licensing scheme regulating the use of long-term, unattended displays in Balboa Park is a prior restraint of speech. "[I]t is the sort of system in which an individual must apply for multiple licenses over time, or periodically renew a license." *Lakewood*, 486 U.S. at 759. A prior restraint of speech is not unconstitutional per se. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). "Any system of prior restraint, however, 'comes to this court bearing a heavy presumption against its constitutional validity.'" *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Accordingly, San Diego's "licensing requirement is sufficiently threatening to invite judicial concern." *Lakewood*, 486 U.S. at 760.

The City's scheme for regulating long-term, unattended displays is an unconstitutional prior restraint of speech if it "vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Id.* at 755; *see Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (invalidating ordinance allowing city to deny parade permit if city believed its public welfare, safety, health, morals, or convenience required denial). In determining whether unbridled discretion is present, we must examine both the nature of San Diego's permit policy and the articulation of that policy. The nature of the permit policy must be to provide "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 151. As to articulating the policy, "the limits the city claims are implicit in its law [must] be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Lakewood*, 486 U.S. at 770. Viewing the facts in the light most favorable to the City, I find that Kreisner is entitled to summary judgment because San Diego's permit policy is unconstitutional by nature. For the same reasons, I would reverse the City's summary judgment. Regarding the City's motion, I also find a triable issue of material fact as to whether San Diego has sufficiently articulated its permit policy.

1. *The Nature of San Diego's Permit Policy.*

Viewing the facts in the light most favorable to San Diego, the City's permit policy does not confine discretion. The City purports to take a "first-come, first-served" approach to issuing park permits. Further examination of the City's statements, however, reveals unwritten, unannounced embellishments to the policy: according to the district court's findings, which coincide with the City's assertions, the request to use the park must be "reasonable," the applicant must furnish "specifics" regarding the desired display, and the applicant must comply with the Park and Recreation Department's permit requirements. What is "reasonable"? What are the requisite specifics? What permit requirements must be satisfied?

That a permit request be "reasonable" is itself an unconstitutional invitation of unbridled discretion. *See, e.g., Lakewood,* 486 U.S. 750 (upholding facial challenge to ordinance giving mayor discretion to deny newsrack permit applications and authority to condition a permit on any terms deemed "necessary and reasonable"). Moreover, although park official Penny Scott stated that she would like to know specifics such as the size and construction material of proposed displays for planning purposes, in the end she apparently had the authority to deny an application when she felt "uncomfortable" with the request. Freedom from unbridled discretion over speech "has a firmer foundation than the whims or personal opinions of a local governing body." *Niemotko v. Maryland,* 340 U.S. 268, 272 (1951). Finally, the City's permit requirements, which appear in the Rules and Regulations Governing Park Use Permits, contain nothing to restrain the official's discretion in deciding whether to grant a park permit. Rather, the regulations merely restrict the park *user* in the event the permit is granted. Thus, viewing the facts in the light most favorable to the City, San Diego does not provide "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth,* 394 U.S. at 151.

Given the City's intimate involvement with the display over the past several decades and the rebuttable presumption that systems of prior restraint are unconstitutional, it was incumbent upon the City to craft and articulate a narrow, objective, and definite park permit policy. San Diego has failed to do so.

2 *San Diego's Failure to Articulate its Permit Policy.*

Even if San Diego's purported first-come, first-served policy with its accompanying embellishments were constitutional by nature, the policy must be evident in a binding text, judicial or administrative opinion, or a well-established practice. The City's permit policy for long-term, unattended displays is found in neither a binding text nor a judicial or administrative opinion. Although the City contends that its policy is a matter of well-established practice, this fact is disputed. Accordingly,

a triable issue of material fact is presented, and we should reverse the summary judgment for the City.

As for binding texts, San Diego admits in its response to Kreisner's interrogatories that there are no "documents which describe the official criteria and standards which are applied to applications for use of the [Balboa Park Organ Pavilion]." The district court on remand stated, and it is not disputed, that beyond the Park and Recreation Department's fees and charges schedule, "the City has not presented any evidence of a written policy regarding the issuance of permits." Findings at 4. The fees and charges schedule says nothing about the method or prerequisites for obtaining any kind of park permit. Moreover, neither the standard application form for obtaining a park permit nor the City's Rules and Regulations Governing Park Permits contains anything regarding the City's first-come, first-served policy or the specifics that applicants must furnish.

Furthermore, it is undisputed that no judicial or administrative opinion prescribes the City's permit policy. The majority takes comfort in the fact that future applicants can go to court if the City fails to follow its purported permit policy so that, in effect, future judicial opinions will circumscribe the City's discretion. Opinion at ___, n.7. The Supreme Court, however, has stated explicitly that "even if judicial review [of a denied permit] were relatively speedy, such review cannot substitute for concrete standards to guide the decisionmaker's discretion." *Lakewood,* 486 U.S. at 771. Indeed, it is the *potential* for government abuse of discretion, rather than the abuse itself, that is so pernicious:

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. ... It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.

Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

The City relies upon the idea that its permit policy is articulated via a well-established practice. Assuming the facts as presented by Kreisner, however, neither the patrons of Balboa Park nor park officials themselves seem familiar with any such practice. Betty Wheeler of the ACLU decided to test the City's purported policy precisely because neither she nor her colleagues who regularly worked with people participating in expressive activities in San Diego had ever heard of such a policy. Jack Krasovich, the Deputy Director of San Diego's Park and Recreation Department, was unsure of what type of permit a long-term, unattended display could receive. He testified at various points that unattended displays are granted "park facility use" permits, "park use" permits, and "special use" permits. Penny Scott, the District Manager for Balboa Park, had never heard of a "non-exclusive use" permit, which was the term that the City Attorney used at oral argument to describe what permit category suited a long-term, unattended display.

In fact, the City's well-established practice seems to negate its claim to a strict first-come, first-served permit policy. As noted earlier, according to the ACLU's version of its experience with the City, Scott stated that the Christmas Committee display was a tradition and that it would be in the Organ Pavilion until the Committee decided not to erect the display again. Moreover, despite the City's co-sponsorship and intimate involvement with the holiday display for 35 of the last 39 years, the City Council has not explicitly articulated its permit policy for long-term, unattended displays. This undermines its claim of having a well-established first-come, first-served policy.

Kreisner's account of the City's rejecting the ACLU's permit application for the proposed Bill of Rights display demonstrates the dangers inherent in giving government officials unbridled discretion over speech. Among the risks that the prior restraint doctrine seeks to minimize are government censorship, self-censorship by speakers, and the unreviewability of constitutional challenges to licensing schemes. *Lakewood*, 486 U.S. at 757-59. All three risks are present here.

First, the prohibition of unbridled discretion is designed to control government censorship of speech. *Id.* at 757; *Southeastern Promotions, Ltd.*, 420 U.S. at 559. There is evidence that San Diego censored speech based on content when it gave priority to the Christmas Committee display over the ACLU's proposed display. Scott's references to the Christmas Committee display as "tradition," her comment that the display was "already booked" when it was not, and her statement that the display "will be there every year until they [the Christmas Committee] decide not to do it again" all suggest the type of censorship that runs amuck over the First Amendment. That Scott offered the ACLU an alternative location for its proposed display does not absolve the City of constitutional liability. *Southeastern Promotions, Ltd.*, 420 U.S. at 556 ("'One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'") (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

Second, the City's unwritten, unannounced permit policy raises the possibility that would-be sponsors of long-term, unattended displays in Organ Pavilion at Christmas time are censoring themselves. This is a constitutionally significant concern. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. Many people may not be aware that they can apply for a permit to occupy the area of the Christmas display during December because written standards are absent. The reasonable San Diegan who has seen the Christmas display for decades is probably unaware that one can display something at that site upon submitting a permit application.

Finally, San Diego's invisible permit criteria make this case difficult to review. These circumstances have troubled the Supreme Court:

> [T]he absence of express standards makes it difficult to distinguish ... between a licensor's legitimate denial of a permit and its illegitimate abuse of

> censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Id. at 758. An unwritten, unannounced permit policy with ad hoc embellishments does not provide the concrete standards necessary to ensure sound judicial review of claims alleging First Amendment violations.

At bottom,

> [i]n the instant case we are met with no ordinance or statute regulating ... the use of the park; all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.

Niemotko, 340 U.S. at 271-72; *see also Kunz v. New York*, 340 U.S. 290, 293 (1951) (ordinance requiring those who wished to hold public worship meetings on the streets to obtain permit from police commissioner gave "administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York ... [and therefore was] clearly invalid as a prior restraint on the exercise of First Amendment rights").

CONCLUSION

"The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee*, 112 S. Ct. at 2658. Given the undisputed facts, San Diego's interrelationship with this religious display of literally biblical proportions violates the Establishment Clause. Moreover, its unwritten, unannounced policy for administering park permits offends the Free Speech Clause. Therefore, I would hold that Kreisner is entitled to summary judgment on these grounds and would reverse the summary judgment for the City.

Furthermore, there is a triable issue under both the Establishment and Free Speech Clauses as to whether San Diego in fact favored the Christmas Committee over another, first-in-time permit applicant. Accordingly, I would reverse San Diego's summary judgment for this additional reason.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD KREISNER,
SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs,

v.

THE CITY OF SAN DIEGO,

Defendant.

CIVIL NO. 88-1993-E(M)

Filed November 9, 1989

MEMORANDUM DECISION AND ORDER

Plaintiffs Howard Kreisner and the Society of Separationists, Inc. brought this suit alleging that the City of San Diego is violating the Establishment Clause of the U.S. and California Constitutions. They seek declaratory and injunctive relief, compensatory and punitive damages, and attorney fees.

Balboa Park is a 1,200 acre public park owned and operated by the City. The park includes an Organ Pavilion, an open air theater with a stage and benches. Other sections of the park house the zoo, museums, theaters, and picnic areas.

Every year, the City sponsors Christmas holiday displays in the park, consisting of a Santa Claus and reindeer, a decorated live Christmas tree, and Christmas lights on the Prado and Laurel Street Bridge. These displays are sponsored in conjunction with the Community Christmas Center Committee.

The City also allows the Committee, a private non-profit corporation, to erect its own Christmas display by the Organ Pavilion. The Committee's display consists of eight sets of life size figures depicting the birth and life of Christ. Four scenes are placed on either side of the Pavilion.

The nativity display is directly adjacent to and approximately 240 feet from the area where the City's secular holiday displays are located. There is a natural foot progression for foot traffic to flow directly from Santa Claus and the Christmas tree to the nativity scene in the Organ Pavilion.

In past years, the nativity display was erected and stored by the City. This year, the display will be erected and removed by the Committee. It is now stored on private property. The Committee reimburses the City $150.00 for the estimated cost of the electricity used. The City does not provide any other services. The Committee must obtain a permit from the City to use the Pavilion. The City plans to issue the Committee a non-exclusive permit for the six week period beginning the last week of November.

The Committee has donation bins and information pamphlets on the site, which ask visitors to make donations to the Committee to support the display. A disclaimer sign explains that the nativity scene is privately sponsored and is not allied with the City.

The parties do not dispute the essential facts, rather they dispute how the law, particularly the recent Supreme Court holding in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 57 U.S.L.W. 5045 (1989), applies to the facts. Both parties move for summary judgment.

APPLICABLE LAW

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). The party moving for summary judgment bears the burden of proving that there is no genuine issue of material fact and that judgment may be entered as a matter of law. *Richards v. Neilsen Freight Lines*, 810 F.2d, 902 (9th Cir. 1987). "[A] party opposing a properly supported motion for summary judgment . . . 'must set forth specific facts showing

that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (citing Fed. R. Civ. P. 56(e)).

The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion ..." U.S. Const. amend I. The amendment applies to the states through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court recently reaffirmed the three prong *Lemon* test in *Allegheny*, 57 U.S.L.W. at 5050.

The *Allegheny* decision dealt with the effect prong of the *Lemon* test. This prong determines whether the challenged governmental practice has the effect of "endorsing" religion. *Id*. The key concern is to prohibit "government from appear ing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id*. (quoting *Lynch v. Donnelly*, 465 U.S. 674, 687 (1983) (O'Connor, J., concurring)).

The line of separation between government and religious organizations is a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. In attempting to draw the line in Christmas display cases, the Court emphasizes the specific facts of a particular case, focusing on the physical setting and context of the challenged display. *Allegheny*, 57 U.S.L.W. at 5051 (Blackmun, J.); *id*[.] at 5059 (O'Connor, Jr., concurring) ("every government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion; *id*. at 5063 (Brennan, J., concurring in part and dissenting in part)) ("context is all important in de-

termining the message conveyed by particular objects."). Thus, the Court found that a creche with a "Glory to God in the Highest" banner located in the main staircase of the courthouse without other secular symbols violated the Establishment Clause because its primary effect, given the setting, was to advance religion. *Id.* at 5052. But a menorah next to a lighted Christmas tree with a banner saluting liberty outside the city-county building did not violate the Clause. *Id.* at 5056-58. In *Lynch*, 465 U.S. at 688, the Court upheld the display of a city-owned and erected creche in a private park in the commercial district when accompanied by other secular symbols, including Santa, reindeer, candy cane poles, carolers, circus animals, a wishing well, and a decorated tree.

In examining the physical setting, the location of the display is an important factor. For instance, displays at public schools raise serious questions, *Allegheny*, 57 U.S.L.W. at 5057 n.69, as do displays located at the seat of government. *Id.* at 5052. When located in a public forum, however, the display raises First Amendment free speech issues. *Id.* at 5052 n.50. Streets and parks, the "quintessential public forums," "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). In these traditional public forums, before the government can enforce a content-based exclusion of communicative activity, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Id.* Thus, the issue becomes whether the government can make a content-based decision to deny access to display a creche in a traditional public forum as necessary in order to serve the compelling state interest of avoiding contravention of the Establishment Clause.

The Court has had two occasions to reconcile the free speech issues in public forum law with Establishment Clause principles. In *Widmar v. Vincent*, 454 U.S. 263, 275 (1981), the Court held that a state university, which made its facilities

generally available for the student activities, could not deny access to a group desiring to use the facilities for religious worship and discussion. The university argued that the content-based exclusion was necessary to serve the compelling government interest of complying with the Establishment Clause. Applying the *Lemon* test, the Court found that an "equal access" policy was compatible with the Establishment Clause. *Id*. at 271. There was a secular purpose in allowing students a forum in which to exchange ideas, and there was no entanglement. Even though it was foreseeable that religious groups would benefit from the access to university facilities, the Court held that the benefits were incidental and did not violate the prohibition against the "primary advancement" of religion. *Id*. at 273. The Court based this conclusion on the fact that an open forum in a public university did not confer any imprimatur of state approval on religious sects or practices, and the forum was available to a broad class of religious and non-religious groups. *Id*. at 274.

Three years later, the Court affi[illegible]ithout an opinion, the display of a creche in a public park by a private group. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court, sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985). Each year a private committee petitioned the city for permission to display a creche in a public park located in the downtown business section. The committee erected and stored the display with its own funds, through [sic] it did use city lights. In 1983, the city denied the permit for fear that the display violated the Establishment Clause. The Second Circuit relied on *Widmar* and *Lynch* to reconcile the principles of free speech in public forum and the Establishment Clause. There was a secular purpose in pursuing an open-forum policy that allowed equal access for religious and non-religious speech. *Id*. at 725. There was no entanglement problem in administering the equal access policy. Citing *Lynch*, the Second Circuit found that the city's neutral accommodation to permit the display, even if it had indirect or incidental effect, did not violate the primary effect prong of the *Lemon* test. *Id*. at 726-27.

DISCUSSION

Plaintiffs argue that the City's practice violates the *Lemon* test and the Court's holding in *Allegheny*. They argue that the "government sponsored" display has no secular purpose, advances the interests of a particular religion, and excessively entangles the City with religion. (First Amended Complaint, p. 6, 9).

Despite the religious content of the Committee's display, there is a secular purpose in the City's practice of allowing it. The Court has long recognized that Christmas has both religious and cultural dimensions. In *Lynch*, 465 U.S. 681, where the Court allowed a city owned creche in a private park, the Court found that celebrating the Christmas holiday and depicting the historical origins of the holiday are legitimate secular purposes. Moreover, as in *Widmar*, the City's open access policy to the park furthers the secular purpose of promoting free speech. Thus, the City's practice meets the purpose prong of the *Lemon* test.

The effect prong of *Lemon* is not violated. Plaintiffs argue that the facts of *Allegheny* and this case are the same. Actually, the facts lie between the impermissible display of *Allegheny* and the permissible display of *Lynch*. Unlike the creche in *Allegheny*, which stood alone in the main stairway of the courthouse, the display here is part of a larger display that contains secular symbols. While the Committee's display, consisting of eight life size scenes, is larger and more extensive than the display upheld in *Lynch*, there are offsetting secular elements in the park, such as the large Christmas tree and the lights along the bridge and El Prado.

"While no sign can disclaim an overwhelming message of endorsement, an 'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Allegheny*, 57 U.S.L.W. at 5057 (citations omitted). Here, the sign explaining the private sponsorship of the exhibit reinforces that the City is not endorsing the message of the display.

Moreover, the park setting itself tempers the effect of the Committee's display. In *Allegheny*, the impermissible creche was in the courthouse, the seat of government, where "no viewer could reasonably think that it occupied this location without the support and approval of the government." *Id.* at 5052. The Court noted that the *Allegheny* case did not raise the kind of public forum issue of *Widmar* and *McCreary*. *Id.* at 5052 n.50. In contrast, here the display is located in a traditional public forum—Balboa Park.

As in *Widmar*, it is possible and foreseeable that religious groups, such as the Committee, will benefit from access to the park. But the enjoyment of merely "incidental" benefits does not violate the primary advancement of religion. Because the park, like the university facilities in *Widmar*, is open to any group, the open access "does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. In addition, the park facilities are available to a broad class of religious and non-religious groups. *Id.*

Finally, the City is not excessively entangled with religion by merely allowing access to the public park to display a nativity scene. In *Lynch*, 465 U.S. at 684, the Court found no entanglement even though the city owned, erected, and dismantled the display. The city was not involved in the design or content of the display. Here, the City is less involved. The City does not store or erect the exhibit, it does not supervise the content of the display, nor does it spend any money maintaining the display. As in *Widmar*, 454 U.S. at 272 n.11, and *McCreary*, 739 F.2d at 725, the content-neutral policy of the City avoids involvement by the City with religion, whereas enforcing an exclusion of religious groups would increase the entanglement.

In sum, the City's practice of allowing the Committee to display a nativity scene in Balboa Park does not violate the Establishment Clause. Given the public forum aspect of the present case, the City's open access policy accommodates both the free speech and the establishment of religion issues of the First Amendment as reconciled by *Widmar* and *McCreary*. Thus, summary judgment in favor of the City is granted.

On a final note, the Court dismisses the plaintiffs' pendent state law claim. The complaint raises objections to the display under the federal and state Constitutions. The parties have only briefed and argued federal law. They have not cited any California case law to interpret the relevant state constitutional provisions. Given the importance of the constitutional issue, the state claim is best heard by the state courts.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby denies plaintiffs' motion for summary judgment, grants defendant's motion for summary judgment on the U.S. Constitution, and dismisses the claim on the California Constitution.

DATED: November 8, 1989.

/s/ WILLIAM S. ENRIGHT, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD T. KREISNER;
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO,

Defendant-Appellee.

No. 90-55354

DC No. CV-88-1993-WBE

Filed September 18, 1991

ORDER

Before: BOOCHEVER, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

Submission is VACATED until further order of the court.

This appeal is REMANDED to the district court for sixty days from the date of this order for the limited purpose of making further factual findings. Specifically, the district court shall determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. The court shall attach to its findings copies of any documents setting forth such policies. If it is contended that there are oral or partially oral policies, the court shall specify any evidence indicating the establishment of such policies and any evidence indicating that the public has been made aware of such policies. The court may make any further findings on factual developments which the parties regard as material to the issues in this appeal.

Upon receipt of the order making further factual findings, the clerk shall immediately deliver copies of such order to this panel.

Judge Boochever dissents from the order of remand and would decide the case on the present record before the panel.

SUBMISSION VACATED and TEMPORARILY REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD T. KREISNER;
THE SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO,

Defendant-Appellee.

No. 90-55354

DC No. CV-88-1993-WBE

Filed October 2, 1991

AMENDED ORDER

Before: BOOCHEVER, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

The Order filed on September 18, 1991 in this action is AMENDED in the following respects:

Following the last sentence of the second paragraph on page 1, the following sentence is added: "The district court also may amend its conclusions of law in light of any new factual findings."

The last paragraph on page 1 is amended to read: "Upon receipt of the order making further factual findings and (if applicable) amending the conclusions of law, the clerk shall immediately deliver copies of such order to this panel."

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD T. KREISNER and the
SOCIETY OF SEPARATIONISTS, INC.

Plaintiffs,

vs.

CITY OF SAN DIEGO, CALIFORNIA,

Defendant.

No. 90-55354

DC No. CV-88-1993 H(M)

Filed December 13, 1991

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Howard Kreisner[1] brought this suit against the City of San Diego, alleging the City is violating the establishment clauses of the federal and state constitutions. The action involves the constitutionality of a display shown in the Organ Pavilion of Balboa Park during the month of December by a private organization, the Christmas Committee.

I

STATEMENT OF PROCEEDINGS

Judge William B. Enright originally heard the case and granted the City's motion for cross-summary judgment in 1989. Judge Enright found the Park facilities are a "public forum," available to both religious and nonreligious groups. Judge Enright concluded the City's open access policy ac-

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[1]The Society of Separationists, Inc. was named as a plaintiff in this action. The Society, however, never made an appearance or submitted any documents to the district court before the appeal. The Society did submit a two-page document to the Ninth Circuit, but this court is unaware of the contents of that document. After the Ninth Circuit remanded the case, the Society did not take timely action to participate in the case.

commodates "both the free speech and the establishment of religion issues of the First Amendment." The plaintiff then appealed the case to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit heard oral argument on April 3, 1991, and subsequently remanded the case to the district court for further factual findings. Specifically, the Ninth Circuit instructed the district court to determine:

> [W]hat are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. ... If it is contended that there are oral or partially oral policies, the court shall specify any evidence indicating the establishment of such policies and any evidence indicating that the public has been made aware of such policies. The court may make any further findings on factual developments which the parties regard as material to the issues in this appeal.

The Ninth Circuit amended the order to allow the district court to "amend its conclusions of law in light of any new factual findings."

Upon remand, Judge Enright recused himself, and the case was transferred to this court. This court held hearings in which oral and written testimony was received on November 1, 1991 and November 8, 1991. Following a review of the evidence received at those hearings, the files and records of the action, and the trial court's Memorandum Decision and Order dated November 8, 1989, this court adopts Judge Enright's Memorandum Decision as the opinion of this court as to the federal claims, attached as exhibit "1," and further makes the following additional findings of fact and conclusions of law. This court agrees with Judge Enright that under the circumstances of this case:

> In sum, the City's practice of allowing the Committee to display a nativity scene in Balboa Park does not violate the Establishment Clause. Given the public forum aspect of the present case, the City's open access policy accommodates both the free speech and the establishment of religion issues of the First Amendment.

II

FINDINGS OF FACT

A. CITY'S POLICY REGARDING PERMITS IN BALBOA PARK

1. In 1988, the City created a system of permits to facilitate and accommodate uses of the Park and Park facilities. Relevant to this case, the City provides five different types of permits: (1) the park use permit, which allows for a partly exclusive, short-term grant for weddings, picnics, or other fairly large gatherings of individuals; (2) the park facility use permit, which allows exclusive use of a Park facility; (3) the right-of-entry permit, which allows exclusive use within a restricted area for longer periods of time and issued primarily to businesses and organizations; (4) the nonexclusive use and occupancy permit, which allows ongoing use of a permanent facility on the condition the facility is open to the public; and (5) the special use permit, which allows exclusive use of a site for Park-endorsed activities, such as square dancing exhibitions.

2. The regulations governing the appropriate type of permit for a particular activity are set forth in the Park and Recreation Department's fees and charges schedule. Beyond these regulations, the City has not presented any evidence of a written policy regarding the issuance of permits.

3. This court finds that the City's policy regarding the issuance of permits is an oral policy. Specifically, the City's policy is one of "first come, first served," allowing access to the Park or Park facilities to any group or individual who reasonably first requests use of the area and complies with the Park and Recreation Department's permit requirements. [2]

a. Penny Scott is employed by the City's Park and Recreation Department as the District Manager responsible for the permit system at Balboa Park. Scott testified at the hearing

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[2]The City has discussed whether it will require an unattended display to be covered when another group renting the space so requests. This policy has not been adopted at present.

held before this court and in her declaration before the Ninth Circuit that the City's policy is first come, first served. Scott testified the City does not grant permits to the Christmas Committee on a preferential basis. This court finds Scott to be a credible witness after listening to her testimony and observing her demeanor.

b. Jack Krasovich, the Deputy Director of the Central Division for the City of San Diego, Park and Recreation Department, is Scott's immediate supervisor. Krasovich also testified that the City's policy is to grant permits for use of the Park and its facilities on a first come, first served basis. This court also found Krasovich to be a credible witness and accepts his testimony regarding the City's policy as true.

4. To obtain a permit for use of the park or its facilities, an individual or group must contact the Park and Recreation's office in Balboa Park. The office is open on Monday through Friday from 7:30 a.m. to 5:00 p.m., and on Saturdays and Sundays from 9:00 a.m. to 3:00 p.m. After the individual or group contacts the office by calling, writing, or visiting the office, a member of Scott's staff works with the individual or group to determine what the intended display or activity involves and the appropriate permit. The general public is welcome to contact the office with questions regarding the acquisition of permits. As to a request for a display, the office reasonably requires specific information regarding the display, such as size and dimension before issuing a permit. Among other reasons, this information is necessary to accommodate other uses and to assure access to the Park for the general public. The office only provides the permit itself and does not utilize a formal permit application form.

5. This procedure and the City's oral policy of first come, first served has not presented a problem in the past. Until this year, as described below, the Christmas Committee has been the only entity to request use of the colonnades at the Organ Pavilion during the month of December for a display. Regarding other areas of the Park, Scott's staff has been successful in accommodating conflicting uses.

6. The City's Park and Recreation Department at Balboa Park is open to the public seven days a week at the times noted above. Beyond the open office, there is no additional evidence that the City has publicized or otherwise taken action to inform the general public of its policy regarding the use of the Park or its facilities. This court, notes, however, that Balboa Park is frequently used by a wide variety of individuals and groups, with and without permits, for demonstrations, vigils, and many other activities. This court accepts the testimony of the City's representative that until this year, there was only one request for an unattended display at Balboa Park. This court finds it reasonable for the City to choose not to expend its resources to publicize its policies and, instead, to provide an office with access to the public to address any inquiry concerning a permit.

7. Two to three years ago, the City agreed that a park use permit would be an appropriate permit for the Christmas Committee display. Consistent with the City's policy, the Park and Recreation office granted a park use permit to the Christmas Committee to exhibit its display in the Organ Pavilion for December 1991.

B. ACLU'S INADEQUATE ATTEMPT TO RESERVE THE ORGAN PAVILION COLONNADES ONE DAY AFTER ORAL ARGUMENT

1. The ACLU has complicated the litigation by partially attempting to obtain a permit for an unattended display at the colonnades in the Organ Pavilion for the month of December 1991. The ACLU has participated in this litigation as amicus and attended the oral argument before the Ninth Circuit on April 3, 1991, at which time the parties agreed to explore a resolution of the case. One day after oral argument, the ACLU sent its employee Janet Bergo to speak with Scott, without advising counsel for the City, about the possibility of obtaining a permit for the same time and location as sought by the Christmas Committee.

2. On April 4, 1991, Bergo brought a letter signed by Betty Wheeler, the legal director of the ACLU, to Scott to discuss the

possibility of obtaining a permit. The letter requested a permit to exhibit a display celebrating the Bill of Rights in honor of the Bicentennial of the Bill of Rights. Bergo also provided a poster, but indicated the display was not intended to duplicate the poster. Bergo did not provide, nor did the April 4th letter provide, any specifics relating to size, dimension, or other mechanics of the display. Scott asked Bergo questions about the specifics of the display, and Bergo responded that the technical details needed to be worked out. Scott testified she informed Bergo she could not issue a permit at that time without further information as to the specifics of the display. Bergo responded she would check with her supervisor and get back to Scott. Bergo testified that Scott seemed excited and enthusiastic about the idea.

3. Later that afternoon, Bergo called Scott to inform her that the display would not be poster size, but would be quite large, similar to the Christmas Committee's display. Bergo still did not know the intended size or dimension of the display or the materials that would constitute the display. Scott credibly testified she needed further information before issuing a permit and waited for Bergo to contact her again with the necessary information. After the City's legitimate request for more specifics, the ACLU took no action to construct any display, to obtain money for the display, to obtain volunteers to design the display, or to provide further specifics for the display to the City.

4. At the direction of Wheeler, Bergo next called Scott in July 1991 to inquire about the status of the ACLU's request. Scott responded that she was waiting for Bergo to provide her with the specifics of the display. After this conversation, Bergo testified that she was aware of the need for more specifics in order for the ACLU to obtain a permit.

5. The ACLU, however, did not contact Scott or anyone else in the Park and Recreation office again until October 2, 1991. On this date, Wheeler sent a belated letter to Scott to "follow up" on Bergo's inquiries. This was the first letter providing some specifics as to the intended display. However, even as of October 2, 1991, the ACLU had no plans, budget,

staff or materials for the display. Regrettably, the ACLU committee in charge of celebrating the Bicentennial of the Bill of Rights did not have any plans for a display at Balboa Park. By this time, the City had issued a permit to the Christmas Committee to exhibit its display during the month of December 1991.

6. In response to Wheeler's October letter, Scott wrote to Wheeler informing her that a permit had been issued to the Christmas Committee for the Organ Pavilion colonnades for the month of December 1991. She explained the ACLU was not issued a permit because Scott was waiting for more specifics as to the ACLU's intended display. Scott had conveyed to Bergo the need for more specific information before issuing a permit. She concluded by offering to work with the ACLU to provide a suitable, alternative location. Wheeler testified an alternative location was unacceptable.

7. This court finds the City issued a permit to the Christmas Committee for December 1991 consistent with its policy of granting permits on a nonpreferential basis. Prior to October 1991, the ACLU had failed to provide Scott with the specifics legitimately requested by Scott or to follow up on Bergo's inquiries. Bergo testified she was not aware of any plans to determine the specifics of the display or to prepare for the display, such as contacting artists or volunteers. After considering all of the evidence and observing the demeanor of the witnesses, the court concludes that the ACLU simply desired to test the City's policy without taking adequate steps to arrange for the construction of a major display or to follow up on its inadequate request for a permit.

8. This court accepts as credible Scott's testimony that she was waiting for Bergo to provide her with more specific information and finds the City would have issued a permit to the ACLU for the colonnades of the Organ Pavilion for December 1991 had the ACLU complied with Scott's requests. In Scott's declaration to the Ninth Circuit, she also testified that she informed Bergo the Christmas Committee's display had been in the Organ Pavilion in the past, but she was unsure as to future displays because of the pending litigation. The

court also finds it is reasonable, in light of the City resources potentially required, for the City to rely on individuals or groups to pursue any request for a permit and to refuse to follow up on each inadequate request.

III

CONCLUSIONS OF LAW

The court adopts Judge Enright's well-reasoned discussion of the law governing Establishment Clause claims and the application of that law to this case. The Supreme Court recently summarized the law relating to the Establishment Clause:

> [The] government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989).[3] A government's actions will violate the Establishment Clause if the action (1) does not have a secular purpose, (2) either advances or inhibits religion in its principal or primary effect, or (3) fosters an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Supreme Court also has scrutinized whether the practice has the purpose or effect of "endorsing" a religion by conveying a preference for a particular religion or religious belief. *Allegheny*, 492 U.S. at 592. Furthermore, "It is well-settled that whether a government display violates the first amendment is indeed a question of law." *Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991).

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[3]The United States Supreme Court has heard oral argument concerning the Establishment Clause in the case of *Lee v. Weisman*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) (No. 90-1014), on November 6, 1991, but has not issued its opinion in that case.

The City has not violated the Establishment Clause by providing equal access to an open forum for a variety of groups, including religious organizations. The secular purpose behind the City's policy is to promote a diversity of ideas and cultures in an area easily accessible to the public. The primary effect of the City's policy neither advances nor endorses a particular religion. By allowing access to the forum on a first come, first served basis, the City merely provides an opportunity for individuals or organizations to engage in activities protected by the first amendment. The City also is not excessively entangled with the Christmas Committee. Other than promulgating a neutral and simplistic policy to allow for wide and easy access to the forum, the City's involvement with the Christmas Committee's display is nonexistent. Therefore, the City has not violated the establishment clause by allowing religious groups equal access to the Park. *See Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981).

This court also concludes the City's actions do not violate California's constitutional provisions. The court is aware of the recent decision of *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991), in which the Ninth Circuit held that, if possible, courts should decide cases on state constitutional grounds and avoid resolving constitutional issues. California's constitution prohibits the establishment of religion and "any appearance the government has allied itself with one specific religion." *Id.* (citing *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978)). In *Fox*, the California Supreme Court held the lighting of a cross on the grounds of city hall exhibited a preference for a particular religion and, thus, was unconstitutional. In *Okrand v. City of Los Angeles*, 207 Cal.App. 3d 566 (1989), a California appellate court addressed the constitutionality of an unlit menorah on the grounds of city hall. The menorah was part of an exhibit which included a Christmas tree. The court concluded the display of the menorah did not exhibit a preference for a particular religious belief because the city made no "effort to express some kind of subtle governmental advocacy of a particular religious message." *Id.* at 574.

This case is clearly distinguishable from *Fox* and is more akin to *Okrand*. The City has not expressed a preference, nor does it appear the City has expressed a preference, for a particular religion or religious belief. The City simply provides an open forum for all groups, religious and nonreligious, to exhibit displays or conduct other activities in the park. The forum is made available to the first individual or organization that reasonably requests access and obtains a permit. Other than prohibiting obscenity and imposing reasonable time, place, and manner restrictions, the content of the message is irrelevant. The City's policy, therefore, also does not violate state constitutional provisions.

This case also is distinguishable from the recent decision of *Murphy v. Bilbray*, No. 90-134 (S.D. Cal. filed Dec. 3, 1991), involving the Mount Helix and Mount Soledad crosses. The *Murphy* case involved permanent religious symbols located on city and county property. This case, however, involves a public forum open to both religious and nonreligious groups to exhibit displays.

IV

CONCLUSION

For the reasons set forth above, the court makes the factual findings as requested by the Ninth Circuit, reaffirms the court's conclusions of law on the federal claims, and makes conclusions of law on the state constitutional claims. This court concludes that the City's practice of allowing a private committee to display a nativity scene during December does not violate the federal or state constitution.

DATED: 12/13/91

MARILYN L. HUFF, JUDGE

APPENDIX B
EXCERPTS OF TRANSCRIPTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD T. KREISNER,
Plaintiff,

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 88-1993-H

EXCERPTS OF TRANSCRIPT OF HEARING RE USCA ORDER

BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

SAN DIEGO, CALIFORNIA
FRIDAY, NOVEMBER 1, 1991 8:50 A.M.

EXCERPTS OF OPENING COLLOQUY

(Call to order of the Court.)

THE COURT: Would you state your appearances, please?

MR. JACOBS: Michael Jacobs and John Delaney for Plaintiff, Howard T. Kreisner, your Honor.

MS. CASTLEMAN: And Penny Castleman and Mary Kay Jackson for the City of San Diego.

THE COURT: Thank you. I received an order from the Court of Appeals for the Ninth Circuit, submission of Howard T. Kreisner, the Society of Separationists, Inc., versus City of San Diego—was vacated until further order of the court.

"This appeal is remanded to the District Court for 60 days from the date of this order for the limited pur-

> pose of making further factual findings. Specifically, the District Court shall determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park. The court shall attach to its findings copies of any documents setting forth such policies. If it is contended that there are oral or partially oral policies, the court shall specify any evidence indicating the establishment of such policies and any evidence indicating that the public has been made aware of such policies. The court may make any further findings on factual developments which the parties regard as material to the issues in the appeal. Upon receipt of the order making further factual finding, the clerk shall immediately deliver copies of such order to this panel."

This case—and then there was an amended order that the Court received on—or after October 2, 1991 which amends the order filed on September 18, 1991 in the following respects:

> "The District Court also may amend its conclusions of law in light of any new factual findings."

And the last paragraph on page 1 is amended to read:

> "Upon receipt of the order making further factual findings and, if applicable, amending the conclusions of law, the clerk shall immediately deliver copies of such order to this panel."

It's my understanding that the previously assigned judge, Judge Enright, recused himself from this matter, and the case was assigned to me.

In a status conference that I had with the parties, I advised the parties of my previous relationship with the law firm of Gray, Cary, Ames & Frye, and I've been advised by writing from the Plaintiffs and a telephone message to my chambers by the Defendants that neither party has any objection to this Court proceeding with the direction of the appellate court. Is that correct?

MR. JACOBS: That is correct, your Honor.

MS. CASTLEMAN: That's correct, your Honor.

THE COURT: Thank you. Then it's a little unusual in that the previous matter was submitted as cross-motions for summary judgment in which both of the parties had said there was no material issue of fact and the appellate court has then remanded for a limited purpose of the Court making further factual findings on a motion for summary judgment where generally the Court does not make factual findings.

Are the parties in agreement that we are having an evidentiary hearing that could be considered a trial of this proceeding?

MS. CASTLEMAN: No, that truly isn't my understanding. It's my understanding from reading the transcript that there were some representations made by Ms. Jackson concerning the permit system in the park, and the Court felt—the Ninth Circuit felt that perhaps there wasn't the documentation previously—or that the District Court had not addressed that documentation in order to make findings on the permit system, and that the Court felt it needed to have those findings in order to either affirm or reverse the summary judgment.

THE COURT: And what's your understanding of the procedural vehicle that we would be using today?

MR. JACOBS: Confused, your Honor. I think—I'm not exactly sure that there is a place in the rules for this sort of proceeding, and I would want to preserve on—for the record—the view that, in fact, there are factual disputes—in fact, a trial on the merits is required, and that this quasi-summary judgment, quasi-fact-finding inquiry is irregular.

THE COURT: Is the—one could take it as augmenting of the record and the appellate court sending it back to augment the record.

MS. CASTLEMAN: In fact, your Honor, that's what we thought we were going to do. When we talked on the phone, I

said it was our impression we were just going to send documents to the Court and to Counsel.

We were surprised when you indicated there was going to be a hearing because that is how we read it.

THE COURT: After I reviewed the file and saw that it was on cross-motions for summary judgment, then I was puzzled concerning why we would be employing a device to make further factual findings when indeed no factual findings had really been made by this Court; however, I've been directed by the appellate court to have—to make further factual findings, and I do believe, if there are any written—it could have been done simply by having what would be typically done in any motion for summary judgment—the parties could have submitted further affidavits, and we would not have had to have a hearing and, in fact, earlier this week I was contemplating whether we should contact the parties and simply have affidavits submitted.

However, since this matter was transferred to me recently and since the appellate court had given the District Court 60 days from the date of the order which was September 18, 1991 and since we did have the time available, and if the affidavits raised any disputed issues of fact, certainly you would have the opportunity to cross examine; although this is an unusual procedure posture for this case to be in, I do think that it's appropriate for purposes of satisfying the Court of Appeals and perhaps augmenting the record to determine what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park and also, in reviewing this matter, this Court had an additional inquiry because I believe that, in addition to granting permits on the issue of whether the park is an open, public forum, I do believe, from this Court's understanding, that there are a number of activities conducted in Balboa Park that require no permit.

On the—I don't know what it's called—on the portion of the park on any weekend, certainly during many afternoons, it is common for displays to be set up, for people to attend, for jugglers to be there, for performers of all types to be there, for

religious presentations, Hare Krishnas to have a setup in the park, and I don't believe, in reviewing the record, that that aspect of the openness of Balboa Park was necessarily addressed in full because I'm not sure—and I would like to find out—are those types of activities that regularly go on in Balboa Park permitted or not, and I do think that that would address the Defendant's position that the park is an open, public forum.

So for purposes of this hearing, I'll first ask the City of San Diego whether you have any additional documents that you wish to put into the record.

MR. JACOBS: Excuse me, your Honor, if I might just raise a couple of other procedural concerns arising out of the unusual posture of the case.

As you noted, the case is on appeal of cross-motions for summary judgment, and one way of proceeding would be to further develop the factual record through the usual procedures that anticipate a motion for summary judgment and determining through that process whether there are disputed issues of material fact.

That, coupled with the fact that the city holds all the relevant information concerning its policies and practices, led us to feel quite strongly that discovery was necessary in order to create a record sufficient to determine whether summary judgment was still appropriate in this case, and so we have a continuing concern about the absence of discovery and would like to reiterate that today, I suppose, but also put it on the record.

From our standpoint, the city could, as it has, stand up and say, "These are our policies." To really understand what the city's practices are is a fairly involved factual inquiry as the kinds of questions you have already set forth in the case.

In the—I'm sorry—

THE COURT: I appreciate your concern. The Court of Appeals order did not address the discovery aspect of this. They did give a 60-day time frame.

If you wish further discovery, it would be impossible for the parties and this Court to have—to meet the Court of Appeals time frame and, if that was truly your wish, then I would apply to the Court of Appeals for them—to vacate the order for a period of six months to a year for the parties to further have—if you truly wish to say at this point that there is no longer a summary judgment, that you want a trial, we could set this matter for trial, if that would be your intent, set a pretrial conference order, set a briefing schedule, set a discovery cutoff, but it was also my understanding that the parties, since they were unable to resolve this issue, might want this issue addressed prior to the holiday season.

And so you can't—it looks like you can't have both.

So one of the reasons for this hearing, which I expressed in our status conference, is that we have a hearing and then see where we were.

MR. JACOBS: I understand, your Honor, and I don't have any objection to going forward today so long as I've preserved my concern about discovery.

The last concern I'd like to raise with you, though, relates to the concern about discovery, and that is a concern about the handling of this matter by the city attorney's office.

We had an agreement concerning discovery that would have had us completed our—the document production and depositions by today.

THE COURT: When you say "we," the Court was not a party to any of this discussion.

MR. JACOBS: No, that's correct. But the city attorney and—we had had discussions with the city attorney's office, sent out deposition notices and document requests pursuant to that discussion, heard no objection until the time immediately preceding the status conference with your Honor.

Subsequently, we had several discussions with the city attorney's office about the exchange of documents that your Honor ordered should occur yesterday, and we flew down—

my associate, John Delaney, flew down a day earlier in order to be able to receive those documents.

He has spoken several times with the city attorney's office which represented to him that the documents would be available yesterday. We have a transcript of a voice-mail message in which we were assured that the documents would be made available to us yesterday.

Yesterday afternoon, at approximately 4:00 o'clock, we were told that there would be no documents available to us, that no documents would be relied upon by the city attorney's office, and hence no documents would be produced to us.

This morning, I have a list of Defendant's exhibits and to be sure they're all exhibits, to the best of my knowledge, based on a quick look at this, these are all documents that are already part of the record.

But you have been told in advance several times, "Yes, I'm gathering the documents; they're here on my desk; I will have them to you," only to be told at 4:00 p.m. yesterday afternoon, "No, there will be no additional documents" raises a very serious concern in our minds, and it relates, of course, to this question of discovery and adequate access to the—to the records, to the underlying facts in this case.

THE COURT: Well, I think the Court wishes to address the merits, if possible, and I really think that any of these types of issues should be able to be worked out by the parties, and it's comforting to the Court, if there are ongoing disputes concerning this matter.

The parties at some time agreed that there were no factual disputes and that this was an appropriate case to be decided on cross-motions for summary judgment.

So—the appellate court has directed, based on the transcript—my understanding of the transcript of what occurred at the oral argument—certain questions to be ironed out, and that is the purpose for this hearing today.

Why don't we proceed with this hearing, and then see where we are. This was on very short notice, that this hearing was even set up, so I do think that our time is best spent avoiding discovery disputes and determining what are the policies of the City of San Diego with respect to granting permits for the use of Balboa Park.

* * *

EXCERPTS OF DIRECT EXAMINATION OF JANET BERGO

* * *

BY MR. JACOBS:

Q. In early April 1991, did you visit the district office of Balboa Park to apply for a use permit?

A. Yes.

Q. Could you tell the Court the circumstances of that visit, please?

A. The circumstances—

Q. What led to that visit?

A. I was asked by Betty Wheeler, the legal director at the ACLU, to visit the office at Balboa Park and to deliver the letter and to talk to the person there about this letter, which was a request for a permit, and the letter goes into more detail.

Q. The letter you're referring to—

MR. JACOBS: If I may, your Honor—

BY MR. JACOBS:

Q. —is this letter?

(Witness proffered document.)

A. Yes, it is.

THE COURT: This letter is Plaintiff's Exhibit A. Is that correct?

MR. JACOBS: I'm sorry, your Honor. Yes, that's correct.

THE COURT: Thank you. I think it can be stipulated that your exhibits that have been lodged with the Court are already identified as A through—only A and B?

MR. JACOBS: Yes. We believe it's through R, your Honor.

THE COURT: All right. A through R.

(Pause.)

BY MR. JACOBS:

Q. Would you describe in as much detail as you can recall what transpired when you visited the office in question?

A. I arrived there during the lunch hour. A receptionist greeted me as I came in the door, and I explained the reason for my visit—was to request this permit and showed the letter.

The receptionist said, "Well, you need to talk to ..." and I don't remember the woman's name. I think it was something like Angelica, but that may be completely wrong. That's what I remember. "That you need to talk to this person," and it was at another desk down the same aisle, a little further in, about this.

And so I went back there and sat with her. She read the letter. We began to have a conversation about it. She mentioned a fee, and I said, "Well, I understood there was no fee," and at some point it became clear that she was the wrong person, that she handled a different type of permit.

And I don't recall the exact reason that we came to that conclusion; it seems that it might have had something to do with being non-profit, but I'm not sure.

Q. What happened next?

A. I'm sorry?

Q. What happened next?

A. Then we were told that we needed to talk with Penny Scott and that Penny Scott was out to lunch, so—you know, would it be all right to wait, and I said, "Sure."

So I waited at the front—there's a little bench there—for maybe 15 or 20 minutes. I'm not sure.

And I saw Penny Scott walk by and go all the way back, and I didn't know her by name yet, but I saw a woman walk by who I was later introduced to as Penny Scott. She walked into the back, into her office, and the receptionist picked up the phone and buzzed her and said, you know, "There's someone here to see you."

So we went back and talked in her office. This was sometime after 1:00 when she had returned from lunch.

I handed her the letter, and she went behind her desk and sat down, and I said a few things to her from the letter, basically the sentences that include—let's see—reading from the letter, I said to her some of the phrases from the first paragraph, that I wanted to request a non-exclusive use permit and it was for the area—or the colonnade area in front of the organ pavilion, as you look at it on the left and right.

And then I gave her a minute to look at the letter. She sat back and went through the letter and asked me questions about different things in the letter.

She came to the point of non-exclusive use permit and said that she had never heard of a non-exclusive use permit.

She came to the word "unattended" and asked if I had preparations for any type of vandalism that might take place, what type of planning do we have for that.

And I told her—I responded that I wasn't aware of vandalism problems—did she think that would be a difficulty.

We had some discussion about insurance. We had some—you know, to protect against that.

She continued to read the letter, so I wanted to give her a minute to see what all was in there, and at some point in the discussion I showed her the poster which I later left with her, and I began to describe the type of panels that we had in mind which the posters represented at that point what I thought would be an approximate size of the panels, and what we would do with the idea, since there are a number of amendments to the Bill of Rights, we would have at least 10 large panel-sized displays, each one depicting a different one.

She took the poster and read to me some of the amendments and seemed very excited about the idea. She was enthusiastic. She liked the poster—from, you know, her expression, she seemed to enjoy reading the poster.

She did ask me questions about how it would be situated, and I said we had to work on the technical details, but I'm sure we could find a way to do that.

At some point in the discussion—I don't recall how it came about—she said, "Well, this is the time when the nativity scene is there," and I don't believe I brought up the word "nativity scene" because I'm not familiar with it as a nativity scene.

She talked about it for awhile and referred to it, and I said to her, "Well, I'm not familiar with this." I had not seen it. I'm new to San Diego.

And I said this date—I sort of emphasized that this date is important in terms of our display since it is the 200th anniversary. So the December 15th timing would be important to us. Did she see that as a problem.

Q. What did she say in response to that?

A. I believe she made suggestions about putting the display in other areas or alongside—along the side of the building, and she said several times, "I think this will work; we just need to work it out."

(Pause.)

Q. Did she indicate any concern about possible conflicts with the display she referred to as the nativity display?

A. I don't recall her mentioning any conflict about this display at this time. Her comments about the nativity scene basically had to do with the fact that it's a tradition; it's always there. You know, it was sort of a discussion like, "You know the nativity scene" which is where I had to sort of say, "I'm sorry; I'm not familiar with it."

So it was more along those lines. It didn't need to be a conflict. I asked her several times if she saw any problem with our having our display there also, or if there was some way that we had to make application for this.

(Pause.)

Q. Did she indicate something about—when she was referring to the—to the nativity display, did she indicate that that would make it impossible for you to use the areas on the side of the stage—on either side of the stage because they were there as a tradition?

A. I don't know if it's actually on the stage.

Q. I'm sorry—to the side of the stage. The area that you had requested.

A. Okay. It's—I'm sorry, could you restate the question?

Q. When she was discussing the fact that the nativity display was a tradition, was she indicating anything about how that would affect your use of the area that you had requested?

A. I don't remember her exact words. I remember at this point it seemed to be a little more problematic than at the outset. I mean, it seemed to puzzle her, and I tried to find out what would be involved in finding out if we could reserve the space.

Q. Is your recollection of her reference to the nativity—what she referred to as the nativity—as a tradition particularly clear today?

A. Yes.

Q. Why is that?

A. I had—in preparation for this, I had looked at my declaration and I remembered the feeling I had when she used that word. It was a little bit jarring to me because it seemed like an acceptance of something which to me seems like a religious display—

THE COURT: Is there a motion to strike?

MS. CASTLEMAN: Yes, your Honor.

THE COURT: Calls for speculation; nonresponsive.

(Pause.)

BY MR. JACOBS:

Q. Your recollection of her use of the "tradition"—the word "tradition" is clear because of how it was—how it jarred?

A. How it jarred me.

Q. And it jarred you because it struck you as odd that a—that a city official would regard the New Testament display as a tradition?

MS. CASTLEMAN: Objection; leading.

THE COURT: Absolutely. Sustained.

BY MR. JACOBS:

Q. What was the conclusion of your discussion with Penny Scott?

A. She wanted to know more details about how it would look. She also said that she needed to talk to her boss, and she said this several times, that she needed to talk to her boss or the city attorney to work this out, and that we would talk further.

(Pause.)

Q. Did she discuss any alternatives—any alternative locations with you?

A. She did.

Q. What were the alternative locations?

A. I don't know what they are because the names were unfamiliar to me, and I don't recall—if she had referred to other places by name, I don't recall what those were. What I recall is that she suggested there might be other spaces that would be good.

Q. Did she take you on a visit of those spaces?

A. No, she did not.

Q. The discussion never left—or is it true the discussion never left her office?

A. That's right.

Q. In your affidavit, Ms. Bergo, you stated that she said about the Christmas Committee, "Well, they are there every year; they are always there."

A. I don't recall her using the words "Christmas Committee."

Q. Was it clear from the—do you recall the context of the discussion?

A. I recall her discussing the nativity scene as being there, always there.

Q. Did you ask her whether you would be able to get the requested—the space you had in mind in 1992?

A. Yes, I did.

Q. And what was her response?

A. That the nativity scene was always there.

Q. Do you recall any other aspects of the conclusion of the discussion?

(Pause.)

A. I don't think so.

Q. What happened—did you have any further discussions with Penny Scott?

A. Yes, I did.

Q. What was that discussion?

A. Later the same day, I called her from—when I was back at my office and informed her that I had been wrong about the size that I had told her. Instead of being—the panels being approximately the size of that poster, they would be quite large, that I had spoken with someone who had seen the nativity figures and, in fact, what we were envisioning doing would be comparable in size to the nativity figures, and that I wanted to let her know this further information.

I also—I know there were more things in that phone call in that declaration; I can't remember what they are right now.

Q. Would it refresh your recollection if I showed you your declaration?

A. I think so.

MR. JACOBS: Your Honor, may I approach the witness?

THE COURT: Certainly.

MR. JACOBS: The declaration is contained as Plaintiff's Exhibit Q, which is a status report to the Ninth Circuit.

(Witness proffered document.)

THE WITNESS: To finish answering your question, did you want me to say what I said to her or what she replied?

BY MR. JACOBS:

Q. What happened in the conversation with her—in the telephone conversation you're referring to?

A. The—

THE COURT: You're using your declaration to refresh your recollection?

THE WITNESS: Yes, I am. There were several points that I wanted to make when I made this phone call to her. The first had to do with the corrected information on the size. The second had to do with finding out if she could give an idea when we would know if the permit would be granted, and I also wanted to ask her about whether the area was reserved.

BY MR. JACOBS:

Q. What did she say?

A. Well, the response—her response to my comment about the size was that the nativity scenes are very large; it's hard to see how they could possibly both be in the same spot.

And at that point I asked her, "Well, then is it reserved for this year?" and her response was something to the effect of, "Well, they're always there; they've always been there."

I said, "How soon will I need to contact you to talk about next year?" and she said, "Well, they're always there." I think I phrased it slightly different in the declaration, but that's the basic—

Q. I'm sorry?

A. That's the basic context of the phone call.

Q. That's the basic contents of your conversation?

A. Right.

(Pause.)

Q. Did anything else occur in that conversation?

A. I'm just looking here again at the declaration. I also brought up the point about wanting to know about that specific space because that was the most important to us.

THE COURT: Why?

THE WITNESS: Why was it the most important?

THE COURT: Yes.

THE WITNESS: Well, this is what I had been asked to try to reserve because the way the columns are arranged would serve as a backdrop for the individual panels, and so that, as people walk along that, they can view them and walk from one to the next and read them. It's a public space that a lot of people walk through pretty regularly.

So that was the visual impact of the panels, the way I understood it.

THE COURT: Why not anywhere else in the park?

THE WITNESS: I don't know. I hadn't looked at other places or thought about other places.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD T. KREISNER,
Plaintiff,

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 88-1993-H

EXCERPTS OF TRANSCRIPT OF
HEARING RE USCA ORDER

BEFORE THE HONORABLE MARILYN L. HUFF
(UNITED STATES DISTRICT JUDGE)

SAN DIEGO, CALIFORNIA
FRIDAY, NOVEMBER 8, 1991 1:50 P.M.

EXCERPTS OF DIRECT EXAMINATION
OF BETTY WHEELER

* * *

BY MR. JACOBS:

Q. With respect now to the application that you decided to file, what specific steps did you go through, prior to actually sending someone down to the park office, to file the application?

A. Well, before I could request the permit, I first had to get approval from my executive director because she is the person from our organization who would have to approve a proposal to do a public education event of any type, and so I talked with her about whether we would be in a position to organize and display that kind of a bicentennial display and got her permission to make application for the permit and, of course, got a commitment from her that our organization—if we were awarded the permit that I was requesting—would put on the display.

Q. You talked to her about—you talked to her about the resources that would be required and that sort of—

A. Yes, I did, and we do have a pretty active public education committee. It involves some of our board members, and I think it probably has also maybe representatives who aren't on the board—I'm not certain of that.

There are people there who are educators on that committee and would be very good resources—for example, for developing the text.

There are some people on there who have some graphics-type experience, and I personally was willing to help do the display. I do a lot of public education work myself and had a lot of ideas for the display.

So one of the things that I did, in answer to your question, was to talk with her and get her approval for the proposal and a commitment that, if we did get the permit, that we would be in a position to do the display.

* * *

EXCERPTS OF CROSS-EXAMINATION OF BETTY WHEELER

* * *

BY MS. CASTLEMAN:

Q. What—exactly what did you talk to the director about concerning the display?

A. I told her about the representations that had been made by the assistant city attorney. I discussed with her my interest in testing whether those representations were accurate in the field, if you will.

I talked with her about how, if we were first in time, that we would get the permit or at least that's the policy and therefore we would have this display to put on, and was she willing—you know, would she approve our doing that because

obviously it—it would involve some commitment of time and resources.

Q. What exactly did you discuss with her concerning the display? In other words, did you discuss size, money, who was going to build it, proposals, bids, those kinds of questions?

A. Yes, we did. I—the idea was that we would build them. I mean, I don't mean the executive director, but people on our public education committee, our volunteers, myself. I mean, I was going to be involved myself in the project.

We would have constructed these things, and we talked about size, that they would be these big panel things, and we talked about the content in the sense that they were going to provide information relevant to the Bill of Rights.

Q. Did you ever begin construction?

A. No.

Q. Why not?

A. Because I never got the permit. I was not willing to build this display unless I got the permit.

Q. It's my understanding that you would not put this display anyplace in San Diego if it couldn't be at the organ pavilion in December?

A. That's correct.

Q. So your enthusiasm, if you will, about the display was only if it could be at a certain place at a certain time.

A. That's correct because I would not have even had the idea to do this display had I not been at the Ninth Circuit argument and heard the representations that were made. I walked out. I—and thought this would be a great thing to do, and I did want to test the accuracy of the representations. I was doing it to test the accuracy of the representations.

Q. Would this not still be a great display someplace in San Diego?

A. It probably would be, but then it wouldn't be as high in my personal priorities.

(Pause.)

Q. Did the planning for the display ever go past the stage of the initial conversation you had with the director?

A. Well, I have—I had talked to people about—if we get the permit, then we would be doing this. We have—there's a lot of public education information that floats around the ACLU nationally, and there is, for example, now a KIOSK (phonetic) display sponsored by the ACLU of Washington state, and I was—I mean, if I got the permit today, I would build the display or I would—the display would be built, but I'm not—it doesn't make any sense to build the display or to go forward with the plans for the display when it is very clear that we are not going to get the permit.

Q. Did you ever submit, other than your October 2nd letter, any just rough sketches as far as size and dimension to the park permit—park people?

A. Well, from day one, which is—what, April 4—Penny Scott knew their size. She knew that they were going to be the same size or at least approximately the same size as the nativity scene—the religious scenes. She knew that from the day that we made the application.

Q. I understand that. My question is, did you ever submit any rough sketches to someone from Park and Rec just to show—

THE COURT: Excuse me. When you say you understand that, I'm not so sure that the state of the record is that.

MS. CASTLEMAN: All right.

(Pause.)

BY MS. CASTLEMAN:

Q. Did you ever submit any rough sketches to Penny Scott showing what was going to be on the display, exactly the size and dimension, not just a general, "It's going to be as big as the nativity scene," but a rough sketch drawing of what was going to be displayed?

A. Well, I'm confused by the word "rough" in the sense that there was rough information there from the beginning. There was a description of the contents. There was a poster that was taken to demonstrate not the size but the—you know, what information about the Bill of Rights could be like, although—you know, although it was rough. I mean, the display would have looked somewhat different because it was going to be a more elaborate display.

But there was rough information about the information—the content of the display from the description in my letter, from the comments made by Jan Bergo when she was visiting with her, from the poster, and as to size there—I don't know what would be more specific than to say the same size as the displays that have been there the last 20 or 25 years.

It would be my assumption that Penny Scott would be very familiar with that size.

Q. Did you ever describe to Penny exactly how the display would be situated in that—would it be—the same way, three-dimensional rooms? Is that what you described to her?

A. I believe that it was described to her as a series—a series of displays, of panel-like displays, and I never thought that description was—I mean, I never understood that we would be required to submit detailed plans about exactly what each thing was going to look like. I mean, that was never said to us.

* * *

EXCERPTS OF CLOSING COLLOQUY

* * *

THE COURT: Then in light of this, do you feel that you've had sufficient discovery?

MR. JACOBS: I'm sorry, your Honor. No, I don't. I don't believe we've had sufficient—

THE COURT: What additional would you—

MR. JACOBS: —discovery.

THE COURT: What particularized requests would you make?

(Pause)

MR. JACOBS: I think there's a lot of factual uncertainty about how the decision to issue the permit to the Christmas Committee this year was—was made, and at what levels it was made and how the ACLU's permit was deemed inactive, and—we're going to argue to you that some inferences can be drawn from what we do know, but it is drawing inferences.

THE COURT: Well, your objection, then—your point is noted for the record. I don't think the Court of Appeal really contemplated that and, given our time frame, I think that you—I've permitted you to subpoena whatever witnesses you wanted, and we've had testimony and you do have the opportunity to debrief that or urge whatever inferences can be drawn from that, and then if the Court wishes—the Court of Appeal wishes anything further to be done in that area, that's something that they can consider since I do think this is an augmentation of the record, as I understand it.

Thank you very much.

MR. JACOBS: Thank you, your honor.

APPENDIX C
RULE INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, in-

cluding the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

No. 93-699

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,
vs.
CITY OF SAN DIEGO,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 USC § 2106 authorize an evidentiary hearing on an issue that arose during oral argument on an appeal from a grant of summary judgment?

2. Assuming, *arguendo*, that an evidentiary hearing mandated by the court of appeals on remand is considered a hearing on the summary judgment motion, does FRCP 43(e) allow oral testimony?

3. Did Petitioner waive objections to summary judgment by failing to make timely objection and stating on the record that the case could be decided without trial?

4. If the Supreme Court finds procedural error, should a grant of summary judgment be reversed if the alleged error did not involve a genuine issue of material fact?

RULES INVOLVED

This case involves Federal Rules of Civil Procedure 43(e) and 56.

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No. 93-699

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,
vs.
CITY OF SAN DIEGO,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Howard T. Kreisner ("Kreisner") filed suit in 1988 alleging that the City of San Diego ("City") violated the Establishment Clauses of the United States and California Constitutions by allowing a private citizen's group, the San Diego Community Christmas Center Committee, Inc. ("Committee"), a nonparty, to place a long-term holiday display in the Organ Pavilion, an outdoor theater in the City's Balboa Park. This display depicts eight scenes from the New Testament and consists of life-size figures and backdrop paintings accompanied by signs and biblical passages in English and Spanish. Kreisner and the

City each moved for summary judgment. (p at a-68)[1] District Judge William B. Enright determined that the parties did not dispute "the essential facts" (P at a-68), and granted the City's motion on the ground that "the City's practice of allowing the Commitee to display the nativity scene does not violate the Establishment Clause. Given the public forum aspect of the present case, the City's open access policy accommodates both the free speech and the establishment of religion issues of the First Amendment. . . ." (P at a-73).

Petitioner misstates the record when he cites Appellant's Opening Brief at 32 for his contention that the City gave the Committee preferential treatment by allowing it to use the Organ Pavilion for its New Testament display "without following the City's own written pemit regulations." (P at 3). On Appellant's page 32 there is no mention of written permit regulations.

Petitioner states that at oral argument before the court of appeals, "City for the first time alleged the existence of an unwritten, unannounced 'first-come, first-served' permit policy under which it issued permits for the New Testament display." (P at 3). In actuality, counsel for the City responded to questions from the court as to the procedure if some person (other than the Christmas Committee) wanted to erect a display in the area. (T at 36). The court commented with approval on the City's commitment to equal access to the park. (T at 62 & 70). The court further stated that it did not question counsel's representations made in answer to its questions, but was concerned because the first-come, first-served language did not appear in the record below. (T at 63). The court pointed out to petitioner that the City's open-forum policy complied with his demands and that in view of the City's "very liberal . . . attractive policy," the parties should try to settle the case. (T at 65).

The parties did not reach a settlement, so the appellate court vacated the appeal and remanded the case to the district court for

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[1]The Appendices follow the test of this Brief in Opposition. References to Petition for Writ of Certiorari are noted as (P at); references to the Transcript of the hearing at the Court of Appeals are found in Appendix A and are noted as (T at).

"sixty days for the limited purpose of making further factual findings to determine the policies of the City of San Diego with respect to granting permits for the use of Balboa Park." (P at a-75). The court ordered the district court to specify any evidence indicating such policies, and gave the court authorization to amend its conclusions of law in light of any new factual findings. (P at a-77).

Following Judge Enright's recusal, District Judge Marilyn L. Huff scheduled a hearing in response to the remand order. In contradiction to petitioner's statement, City made no motion regarding discovery; rather, petitioner raised the issue but failed to make a Rule 56(f) motion for discovery. Hence, Judge Huff foreclosed discovery sua sponte.

On remand, the district court commented that the procedure was somewhat unusual and inquired of the parties as to their understandings of what the procedure was to be. The City expressed surprise that there would be a hearing and petitioner's counsel stated that he was confused. An expression of confusion, however, is not an "objection" on the record to the notion that the hearing constituted a trial. (P at 4). Petitioner, on the one hand, objected to the proceeding being termed a trial, then stated that "a trial on the merits is required." (P at 5).

City's witnesses testified as to the City's permit procedure and oral policy of first-come, first-served which was reiterated by the district court in the findings of fact:

> This procedure and the City's oral policy of first come, first served has not presented a problem in the past. Until this year . . . the Christmas Committee has been the only entity to request use of colonnades at the Organ Pavilion during the month of December for a display. Regarding other areas of the Park, Scott's staff has been successful in accommodating conflicting uses.

(P at a-81).

The district court's findings of fact also stated that: "The ACLU has complicated the litigation by partially attempting to obtain a permit for an unattended display at the colonnades in the

Organ Pavilion for the month of December 1991." (P at a-82). One day after oral argument a former employee of the ACLU was sent to speak to the City's Park and Recreation representative about the possibility of obtaining a permit for the area in question during the next holiday season. However, no specifics were provided to the City at that time, nor did the ACLU follow through on its request until six months later, in October 1991. (P at a-83).

In the court's finding of facts and conclusions of law, the judge found it "reasonable, in light of the City resources' potentially required, for the City to rely on individuals or groups to pursue any request for a permit and to refuse to follow up on each inadequate request." (P at a-85). The district court made the factual findings as requested by the Ninth Circuit, reaffirmed the earlier court's conclusions of law on the federal claims, and made conclusions of law on the state claims, holding that the City's practice of allowing a private committee to display a nativity scene on a public park did not violate either the federal or state constitution.

Upon receipt of the district court's further factual findings, the Ninth Circuit issued an opinion, on March 3, 1993, which affirmed the grant of City's motion for summary judgment. On August 2, 1993, the court denied Petitioner's motion for rehearing and rejected the suggestion for rehearing en banc. The court also amended its March 3, 1993 opinion and stated specifically *inter alia* that "Kreisner . . . objected to the nature of the district court's findings . . . but did not object to our remand order or to the holding of an evidentiary hearing, nor is there any indication that he did not have sufficient notice to present his case." (P at a-2, a-8, n.3). Petitioner responded, without authority, that the court of appeals was "simply wrong, therefore, when it states that Kreisner did not object to . . . the holding of an evidentiary hearing . . . "(P at 4).

In the original hearing at the appellate court, after considerable discussion of policy and procedure, the court reminded the parties that "[T]he bottom line is still the establishment clause." (T at 66). In its August 1993 opinion, the appellate court upheld the City's motion for summary judgment, stating that "the City

has not violated the Establishment Clause by allowing the Christmas Committee to erect a religious display in the Organ Pavilion." (P at a-29).

REASONS FOR DENYING THE WRIT

INTRODUCTION

The decision of the Ninth Circuit Court of Appeals is not in conflict with the decisions of other United States courts of appeals on the same matter; nor has the court departed from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

I

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10 of the Supreme Court Rules states that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor, and outlines the considerations governing review on writ of certiorari.[1] Cases will qualify for review under this Rule by reason of their importance, novelty, or difficulty — none of which apply to this case. Several Supreme Court justices have discussed the grant of certiorari where there may have been error below and noted that the Supreme Court is not primarily concerned with the correction of minor errors in lower court decisions.[2]

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[1]Rule 10 .1.(a): "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

[2]*Boag v. MacDougall*, 454 U.S. 364, 386 (1982) (Rehnquist, J., dissenting); *Anderson v. Harless*, 459 U.S. 4, 12 (1982), (Stevens, J., dissenting); *Alabama v. Pugh*, 438 U.S. 781, 782-82 (Stevens, J.,

Petitioner's main complaint in the Petition for Certiorari is that the procedure of the appellate and district courts in this case violated judicial precedent and created opportunities for confusion in the lower courts. However, neither the appellate court nor the district court departed from the accepted course of judicial proceedings to such an extent as to require Supreme Court supervision. The court of appeals actually *followed* precedent set by several circuit courts, and direction from this Court as well. In *Network Publications, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212, 215 (11th cir.), the district court cited this Court's decision in *Neely v. Eby Construction Co.*, 386 U.S. 317, 329, (1966): "[I]f appellee presents no new trial issues in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case." And the Ninth Circuit in *Starsky v. Williams*, 512 F.2d 109, 117 (9th Cir. 1975) noted that "[I]n the interests of proper adjudication, we think it best to resolve the confusion by remanding the case to the district court for a decision on the limited questions . . ." In *Zachos v. Sherwin-Williams Co.*, 166 F.2d (5th Cir. 1948) the appellate court stated that it would "direct that the District Court hear further evidence . . . and make findings of fact and conclusions of law thereon, and cause such findings and conclusions to be certified to the Court of Appeals to be considered by it as part of the record on appeal."

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dissenting), cert. denied, 438 U.S. 915 (1978); Robert J. Stern *et al, Supreme Court Practice*, (6th ed. 1986) 28 n.81.

II

COURTS HAVE BROAD DISCRETION IN DISPOSITION OF CASES ON APPEAL

1. Appellate Courts' Discretion on Review.

28 USC § 2106[3] provides appellate courts with power to make such disposition of a case as requried in the interest of justice. Courts, including the U.S. Supreme Court, have long acknowledged this authority. For example, in *Waters v. Thornburgh*, 888 F.2d 870, 876 (D. C. Cir. 1989) the court held, "Once an appellate court has jurisdiction in a case, it has broad discretion to order the appropriate relief. 28 U.S.C. § 2106."

At oral argument in this case, the appellate court expressed concern about documentation on the record of respondent's counsel's reply to the court's questions, so the court remanded to the district court for the limited purpose of making further factual findings. Several courts have approved similar procedures. For example, in *Hunter Douglas Corp v. Lando Products, Inc.*, 235 F. 2d 631 (5th Cir. 1956), the rule was established that a court of appeal retains jurisdiction of action where it makes limited remand for finding of facts. *See also Thompson v. Camp*, 167 F.2d 733 (6th Cir.), cert. denied, 335 U.S. 824 (1948), where the court held that "In spite of the early common law rule to the contrary, it appears now settled that this Court has the authority to limit issues upon remand to the District Court. . . ." This rule has been cited and followed continually. *See Yehia v. Rouge Steel Corp*, 898 F.2d 1178, 1184 (6th Cir. 1990); *Jamison Co., Inc. v. Westvaco Corp.*, 530 F.2d 34, 37 (5th Cir. 1976).

Petitioner claims that the procedure utilized by the appellate court is erroneous simply because it is unusual. However, both

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[3]28 USC § 2106: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

statutes and case law authorize appellate courts to utilize whatever disposition is necessary to ensure the interests of justice.

> [T]he appellate court, if it concludes that a critical issue of ultimate fact has not been sufficiently developed and considered should remand for that purpose rather than deny summary judgment on the ground that there is a triable issue of fact.' That the record below may have been inadequately developed does not transform what would otherwise be an ultimate fact issue proper for summary judgment into a triable issue.

William W. Schwarzer et al, *Summary Judgment Under the Federal Rules: Defining Genuine Issue of Material Fact*, 99 F.R.D. 465, 475 (1982).

2. District Courts' Discretion on Remand

When an appellate court remands a case to the district court, the lower courts are allowed discretion as to the procedure followed on remand. In *Sierra Club v. Penfold*, 857 F.2d 1307, (9th Cir. 1988), the court cited Title 28 § 2106 and said that, "Once remanded, the district court was free to rule not only on the issue directed in the remand, but other issues as well, so long as our mandate did not direct to the contrary." *See also McClure v. O'Henry Awning Co.*, 192 F. 2d 904 (7th Cir. 1951), where upon remand from the court of appeals to the district court for purpose of finding a specified fact, it was the duty of the trial court to resolve the disputed fact and the trial court also had discretion to hear additional evidence on the issue, but could also make findings of fact from the record. In the case before this Court, the amended remand order included directions that "[t]he district court also may amend its conclusions of law in light of any new factual findings." (P at a-77) Accordingly, the district court was free to ensure that all relevant issues received full consideration.

At the beginning of the hearing, the district court had expressed uncertainty about the hearing's purpose (P at 3), but in noting that the appellate court had set a 60-day limit, the court then stated that the procedure was appropriate for purposes of satisfying the court of appeals. The district court told the parties

that with the inclusion of oral testimony, "[C]ertainly you would have the opportunity to cross examine." (P at a-91) Hence, the court alleviated any suggestion that petitioner's right to cross-examine witnesses had been violated. Petitioner, rather than being damaged by the court's taking oral testimony, actually benefitted because he had the opportunity to observe and examine his own witnesses, cross-examine City's witnesses, and make any relevant argument.

III

PETITIONER'S ALLEGATIONS DO NOT WARRANT GRANT OF CERTIORARI

1. Specific Allegations of Procedural Error

a. District Court's Evaluation of Witness Credibility.

Petitioner complains that the district court on remand heard oral argument and then based its decision on evaluation of witness credibility. This argument follows the narrow view that the fact finding was exclusively a summary judgment hearing and witness credibility should not be considered. Assuming, arguendo, that the procedure on remand was a summary judgment hearing, FRCP 43(e)[4] allows oral testimony on motions for summary judgment, and numerous circuit courts have recognized this right. For example, the court in *Hayden v. First National Bank of Mt. Pleasant, Texas*, 595 F.2d 994, 997 (5th Cir. 1979) held that "[R]ule 43(e), which authorizes the use of oral testimony in motions, is applicable to motions for summary judgment, even though Rule 56 is silent on the point." *See also State of Utah By & Through Div. of Parks v. Marsh*, 740 F.2d 799, 801 (10th Cir. 1984), where on a motion for summary judgment, the court ordered an evidentiary hearing at which the relevant factual issue was to be determined.

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[4]FRCP 43(e): "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partially on oral testimony or deposition."

The generally accepted rule is that courts may not base summary judgment opinions on credibility determinations. However, some courts have deviated from the rule in certain cases. In *McLaughlin v. Liu*, 849 F.2d 1205, 1209 (9th Cir. 1987), a case dealing with circumstantial evidence of conspiracy, the court held that "[W]here there is no direct evidence of a conspiracy, the defendant may discharge its summary judgment burden by proffering a 'plausible and justifiable' alternative interpretation of its conduct that rebuts the plaintiff's allegation of conspiracy." *See Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 558 (1986) also a conspiracy case in which this Court stated that "[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists . . . ."

Petitioner's evidence that the City discriminated against the ACLU is totally implausible, and the City's evidence of the open policy plus the fact that no one else had requested a permit for a similar display, was a plausible and justifiable alternative interpretation of its conduct. In addition, although the district court at one point noted that it found respondent's witnesses to be credible, the findings were not based solely on that determination. In its Findings of Fact and Conclusions of Law, the court delineated only one Finding which referenced witness credibility. (P at a-84)

In *Johnson v. Washington Metro. Area Transit Auth.*, 883 F.2d 125, 128-29 (D.C. Cir.), cert. denied, 494 U.S. 1027 (1989), the court noted that "[J]udges may, under certain circumstances, lawfully put aside testimony that is so undermined as to be incredible. . . . when a plaintiff's claim is supported solely by the plaintiff's own self-serving testimony, unsupported by corroborating evidence. . . ." citing *Law v. Virginia Stage Lines*, 444 F.2d 990 (D.C. Cir. 1971) and *Southern Pacific Co. v. Matthews*, 335 F.2d 924 (5th Cir. 1964), cert. denied 379 U.S. 970 (1965). Here, the district court specifically noted the ACLU's "inadequate attempt to reserve the organ pavilion colonnades one day after oral argument at the Ninth Circuit." (P at a-82) Petitioner, on the other hand, has cited that same ACLU testimony in an attempt to prove that the City did not have the open-forum/open-

access policy represented by counsel at oral argument and noted by two district courts below. (P at a-73; P at a-86).

In its amended opinion of August 2, 1993, the Ninth Circuit specifically found that

> Kreisner cites to no evidence that fees are ordinarily charged to non-exclusive users, nor does he provide any basis for challenging the City's categorization of the Committee's use as non-exclusive. Accordingly, we conclude that the City's grant of a non-fee permit to the committee is consistent with a content-neutral policy and does not violate the Establishment Clause. (P at a-27)

b. Discovery.

Petitioner alleged that he had requested additional discovery, but did not submit an affidavit as required by Rule 56(f).[5] A request for discovery must be specific and not merely a comment to the court. For example, in *United States of America v. One 1985 Mercedes*, 917 F.2d 415, 418 (9th Cir. 1990), the court held that a Rule 56(f) motion must show how additional discovery would preclude summary judgment; *see also Securities and Exchange Commission v. Spence & Green*, 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981) where the court stated that "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." Petitioner's counsel expressed a concern about discovery, but he did not request a continuance and, in fact, agreed to go forward with the hearing.

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[5]FRCP 56(f): "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

c. New Issue Raised on Appeal.

Contrary to petitioner's inference, respondent did not raise a new issue on appeal. The appellate court, in reaction to counsel's response in oral argument, stated that additional facts would be helpful. But in so doing, the appellate court did not create a new procedure in asking for more information. There is precedence for remand for clarification of issues not raised below.

The seriousness of remanding to the district court for further findings on an issue not raised below has not been taken lightly by the courts, but it has been allowed. *See U.S. v. Approximately 2,538.85 Shares of Stock*, 988 F.2d 1281 (1st Cir. 1993), "Only in extraordinary circumstances will we remand for further findings on an issue not timely raised below. . . . (citations omitted). But we find this to be such an extraordinary case."; *see also K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471 (9th Cir. 1974), "[E]xceptional cases or particular circumstances may prompt a review court, . . . to consider questions neither pressed nor passed upon below; power to raise and decide questions sua sponte is, however, to be exercised sparingly and with full realization of restrictions and limitations inherent in its employment."; and *In Re Elmore*, 382 F.2d 125, 127 (D. C. Cir. 1967) where the court cited *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) for the rule that "there may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court below." In this case, the appellate court has commented that it did not disbelieve the representations of City's counsel, but decided sua sponte to remand for further information to aid in making its decision.

d. Standard of Review.

Courts have held that if the procedure at issue is classified a summary judgment motion, the usual standard for review is de novo. However, where there is a mixture of law and fact, as here, courts may combine the two standards of de novo (or plenary) and clearly erroneous review. *See Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1573 (11th Cir.),

cert. denied, 498 U.S. 998 (1990), where the court found a mixed question of law and fact and applied the clearly erroneous rule to the fact portion of the mix and the plenary review standard to the legal component. Here, the court's review was proper since the proceedings were comprised of both summary judgment and evidentiary hearing and the issues presented were a mixture of law and fact.

2. Defects in Petitioner's Case

a. No Genuine Issue of Material Fact.

Respondent's position is that the hearing at the district court on remand took on the character of an evidentiary hearing, rather than a hearing on a summary judgment motion. However, should this Court rule that the hearing was in the nature of a summary judgment motion, respondent would argue that the issue addressed was not a genuine issue of a material fact such that would affect the outcome of the Court's review of the case.

Defining a material fact and distinguishing between a material fact and a genuine issue of law has not been easy. However, this Court has clarified the meaning of a material fact in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986), "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." And the district court in *Barrett v. Craven County Bd. of Ed.*, 70 R.F.D. 466, 478 (1976) provided assistance in discerning a genuine issue, "[A]n issue may be material but not genuine. A pretended issue is one that no substantial evidence can be offered to maintain and is not genuine. (citation omitted) A dispute as to an immaterial fact does not bar summary judgment." A disputed issue may be material, but at the same time not genuine and therefore does not preclude summary judgment.

The attempt of the ACLU to interfere in this case and confuse the issue of the City's relevant policy is a clear example of a pretended issue for which no substantial evidence can be offered to maintain; hence, that is not a genuine issue. *See Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988), "[I]f the factual

context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. (citation omitted) No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *See also Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975), "While the facts embraced . . . are both material and relevant to the issues raised by the pleadings, we reject appellant's efforts to characterize them as *genuine* issues of fact."

b. Waiver of Objection to Proceeding.

Petitioner did not object to the character of the proceedings at oral argument, and, in fact, told the appellate court that, "No. I think you can decide this case without sending us back to, to [sic] trial." (T at 27, 11. 5-8) With that statement, petitioner waived any objection to the proceedings and could not later claim that there are factual disputes and that a trial on the merits is required.

An objection is waived if not timely presented, or if a party participates in the allegedly offending proceeding. *See John Deere Inc. v. Shamrock Industries*, 929 F.2d 413 (8th Cir. 1991), where plaintiff waived notice requirement by briefing and arguing the issue in its own motion for summary judgment, and did not request additional time to respond to defendant's motion; and *U.S. V. Eccles*, 850 F.2d 1357 (9th Cir. 1988), where the court held that a technical defect was not waived by failing to object below since counsel did not actively participate in the oral argument on the motion in the district court. In this case, Petitioner's counsel specifically told the court that he had no objection to proceeding and then participated fully in the argument. As the court in *Trustees of Sabine Carp. H. & W. Fund v. Lightfoot Home Builder*, 704 F.2d 822, 828 (5th Cir. 1983), noted, "[T]o require the district court to give every party who loses another day and thus to grant the loser a replay would be unfair to the party who was prepared and who prevailed."

CONCLUSION

The court of appeal's decision does not meet any of the considerations governing review listed in Rule 10 of the Supreme Court Rules. There is not sufficient conflict with other courts of appeals' decisions on the same matter, nor has the Ninth Circuit in this case so far departed from the usual course of proceedings as to call for this Court's power of supervision.

As the appellate court reminded the parties at oral argument, "[T]he bottom line is still the establishment clause." (T at 66, 11. 13-14). Respondent has stressed the propriety of the procedure on this case up to the present and respectfully reiterates that two district courts have found that the City of San Diego's policy of allowing a private party to erect a display in a public park violates neither the federal nor California constitution. For the foregoing reasons, the Court should deny the writ.

Respectfully submitted,

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Assistant City Attorney

By Mary Kay Jackson
City of San Diego

APPENDIX A

EXCERPTS OF TRANSCRIPTS

NINTH CIRCUIT COURT OF APPEALS

HOWARD T. KREISNER,
Plaintiff.

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 90-55354

EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF MOTION ON APPEAL

BEFORE: BOOCHEVER, KOZINSKI, and O'SCANNLAIN, Circuit Judges

PASADENA, CALIFORNIA
April 3, 1991 9:00 A.M.

Pgs. 36-37:

THE COURT: Can somebody just sort of go in and plop 'em down in Balboa Park anywhere they want to?

MS. JACKSON: Yes

THE COURT: No permit required?

MS. JACKSON: Yes. Correct.

THE COURT: And, and they would, you are now representing, on behalf of the City, that somedody, if Mr. Kreisner or somebody went in and did that, they would not be removed or prosecuted?

MS. JACKSON: It would depend, Your Honor on the size.

We would have to make sure — it's kind of a first come, first served — we don't want the people punching, we don't want anyone arguing because —

THE COURT: No, no. I understand. Because you're saying —

Let's say that somebody has something about the same cubic feet as this display. And that tomorrow they decided to just plop it down in the middle of the park somewhere, or —

MS. JACKSON: About the same size of this display, they would have to get a, a permit that would be a notification that they wanted to do that, so they would have the right to put it here and nobody else would come up and fight them for that particular spot.

THE COURT: Okay. It would automatically be granted is what you're saying?

MS. JACKSON: Yes.

THE COURT: The permit?

MS. JACKSON: Yes.

THE COURT: And you're presenting this on behalf of your, of the City, you're making a presentation on behalf of the City that you're binding the City to this.

MS. JACKSON: Yes.

THE COURT: Without fee?

MS. JACKSON: Without fee.

THE COURT: For as long as they wish?

MS. JACKSON: Well, I think three to five years or something we'd be getting into a lease situation.

P. 60, 11. 1-25 & P. 61, 11. 1-3:

THE COURT: What I heard the answer was, and we have it on tape, we can — but what I, what I heard the answer was, it's on a first come first served basis, subject to not using the same, um, actual physical space at the same time, uh.

Ms. Jackson did say, for example, they could have a menorah on the middle of the, of the display, right in between the two Christmas displays.

But isn't that the kind of thing that you and she can work out? If, if the kind of detail that you are talking about is really

troublesome, it seems to me that, ah, there's been a very major concession here —

MR. JACOBS: Major concession? I —

THE COURT: That ought to, subject to teasing out the details, ought to resolve any legitimate concerns. No?

MR. JACOBS: And the third argument, and maybe the dispositive one here, is it doesn't matter really, because the courts have held, over and over, that even in a public forum, if there is endorsement, the, the establishment clause trumps and not —

THE COURT: Well, but here is where —

MR. JACOBS: — vice versa.

THE COURT: — you get voiced (phonetic) [hoist] on your robust public forum argument.

Because, if, in fact, things are as Ms. Jackson represents, by the magic of traditional (phonetic) [judicial] admissions, they become traditional (sic) precedence, because she said it.

P. 62, 11. 3-21:

THE COURT: (inaudible) the arguments you're making, because you have a far different situation where the governmental authorities want to depress speech where they don't like the different kinds of speech.

It's not that often one gets a City whose lawyer gets up here, or any kind of government (unintelligible), and they say, look it's okay. We want to create a forum for our citizens, whatever their belief, whatever their religion, whatever their message, you know, subject to not having riots, have them, have them present their views.

And how do you get something like that started if, you know, the first one that comes on the scene they say, well, that's an endorsement because you don't have other things at the same time.

These things get started sequentially, and now you've got this and now they've said, we welcome, invite everybody else

Maybe next year you'll have more things.

P. 63. 11. 15-21:

THE COURT: Is there anything in the record of any City action to create such a public forum?

MR. JACOBS: Not at all.

THE COURT: I'm not questioning the representations that counsel has made.

But we usually look at these matters on the record that comes up to us.

P. 65. 11. 1-16:

THE COURT: That's a very liberal, ah, attractive policy. It's, you know, it, one should be reluctant to — if that's what they want, why not tease it out of them and —

MR. JACOBS: I'm not sure, procedurally how one teases that out. If —

THE COURT: Well, one could try to settle the case.

MR. JACOBS: — you remand for a trial or something —

THE COURT: One could try to settle the case, if you'd like some time to do that. Perhaps — it seems to me that should satisfy, if, in fact, these presentations are what they appear to be and you are only worried about details, it seems to me this requires no — to be satisfied — I don't know —

P. 66, 11. 13-16:

THE COURT: The bottom line is still the establishment clause. Has the city, as a public entity, established religion within the context of all our cases.

P. 70 11. 1-15:

THE COURT: But, it seems like this is a, it's so close to solution that should be acceptable to everybody.

Why don't we defer submission (phonetic) for 30 days?

Ms. Jackson, would you be willing?

And, you're here, it's lunch time. Why don't you go out to lunch together, with Mr. Kreisner, and keep in mind what, what you've been hearing.

You know, it's an attractive solution to have a city say, this is a, it's just something we haven't seen in the law very often, and it ought not to be squelched.

Because, you know, all we can do is have judgments. We can, we can affirm or reverse.

Working out all these nice accommodations is really more in the province of the parties.

MR. JACOBS: I appreciate that, Your Honor, and we will —

APPENDIX B

RULES INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 43(E)

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

FEDERAL RULE OF CIVIL PROCEDURE 56

Appears in Petition for Writ of Certiorari in Appendix C at a-111.

No. 93-699

(3)

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,

v.

CITY OF SAN DIEGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In opposing petitioner Kreisner's petition for writ of certiorari, respondent City accepts the heart of Kreisner's contentions: that the district court granted summary judgment based on credibility determinations and that the court of appeals reviewed the grant of summary judgment under a clear-error standard. The City nonetheless defends the procedure.

• The City argues that the procedure was proper because it occurred after an appeal and limited remand. There simply is no authority, however, for the proposition that a district court has greater discretion on remand than it does before an appeal or that a court of appeals should be more deferential

toward a district court's findings when the findings follow a remand by that court of appeals. None of the cases cited by the City so hold.

• The City argues that Kreisner's evidence is "implausible" as a matter of law. Even if a district court may make such a finding on summary judgment, the district court here did not. Instead of analyzing the *plausibility* of Kreisner's evidence, i.e., whether it put forth allegations that might be true, the district court analyzed the *credibility* of Kreisner's evidence, i.e., whether in the court's view the allegations were true based on the character and demeanor of the witnesses.

Indeed, on the record before it, the district court could not have found Kreisner's evidence to be implausible. Kreisner introduced evidence that City employee Penny Scott told ACLU employee Janet Bergo that the City "always" permitted the Christmas Committee to mount its New Testament display. Appendix to Petition for Certiorari ("Appendix to Petition") at a-101. This evidence is plausible because Scott is quoted as saying only what was true: the City "permitted" and "co-sponsored the display for 35 of the last 39 years." *Kreisner v. City of San Diego*, 1 F.3d 775, 791 (9th Cir. 1993) (Boochever, J., dissenting), *reprinted in* Appendix to Petition at a-32.

The City's citation to two conspiracy cases in support of its position thus is inapt. *McLaughlin v. Liu*, 849 F.2d 1205, 1209 (9th Cir. 1987), addresses the dismissal of circumstantial evidence on summary judgment. In contrast, Kreisner offered direct evidence in the form of live testimony to refute the City's position. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 558 (1986), addresses the plausibility of a defendant's motive to engage in certain anticompetitive conduct in view of well-understood economic theory. The plausibility of the City's motive to favor the New Testament display is unquestionable given the City's history of co-sponsorship of the display.

Again, the district court never found any evidence to be "implausible," but instead found the City's testimony to be "credible," accepted the City's evidence as "true," and concluded that the testimony Kreisner offered was false. Appendix to Petition at a-81, a-84.[1] These findings are improper on summary judgment. *See* Petition at 8 and cases cited therein.

• The City apparently concedes that the ACLU's permit request is material, but argues that it does not raise a genuine issue for trial because it was "implausible." *See* Opposition at 13. Again, no such finding was made, nor could it have been made on the record in the district court.

• The City argues that a court of appeals hearing a mixed question of law and fact should apply "the clearly erroneous rule to the fact portion of the mix and the plenary [de novo] review standard to the legal component." *Id.* The City cites one case, *Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1573 (11th Cir.), *cert. denied*, 498 U.S. 998 (1990), for the proposition that a court of appeals should review a district court's fact findings on summary judgment for clear error. The decision so states, but in merely a passing reference. In any case, it is against the overwhelming weight of contrary authority cited in Kreisner's Petition.[2] In addition, the City

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[1] The City argues that the district court "delineated only one Finding which referenced witness credibility." Opposition to Petition for Certiorari ("Opposition") at 10. In fact, there are at least four such references. *See* Appendix to Petition at a-81 ("This court finds Scott to be a *credible* witness after listening to her testimony and observing her demeanor"); *id.* ("This court also found Krasovich to be a *credible* witness and accepts his testimony regarding the City's policy as true"); *id.* at a-84 ("After considering all of the evidence and *observing the demeanor* of the witnesses, the court concludes that the ACLU simply desired to test the City's policy ..."); *id.* ("This court accepts as *credible* Scott's testimony that she was waiting for Bergo to provide her more specific information ...") (emphasis added in all parentheticals).

[2] *Stephens* in turn relies on *United States v. Wilson*, 894 F.2d 1245, 1254 (11th Cir. 1990), which applied the mixed-question standard to a district

fails to explain how the district court's finding that two City employees testified credibly, for example, presents such a mixed question.

• The City argues that Kreisner failed to preserve his discovery objection by failing to file a Rule 56(f) affidavit. The City does not deny Kreisner's allegation that the City created the discovery dispute by reneging on its agreement to provide discovery documents, or that the district court foreclosed discovery on the City's motion. *See* Petition at 3. Kreisner then objected on the record to the lack of discovery. Appendix to Petition at a-93 to a-95. Because the district court previously had ruled against Kreisner on the same discovery issue, a formal Rule 56(f) motion would have been futile. On these facts, no Rule 56(f) affidavit was required.

• The City argues that Kreisner somehow waived his objection to the remand procedure. The City relies on a statement[3] made by Kreisner's attorney at oral argument in the Ninth Circuit more than five months *before* that court issued its remand order. The statement the City cites has nothing to do with the remand procedure.

Rather, in the statement at issue, Kreisner argued that the court of appeals could find as a matter of law that the City's alleged policy was a pretext to favor the Christmas Committee's New Testament display, and could thereby grant his summary judgment motion. *See* Appendix to Reply at a-1 to a-3. Later during the same argument, the City represented for the first time that it had an unwritten first-come, first-served policy under which it granted permits for unattended displays. *See Kreisner*, 1 F.3d at 800 (Boochever, J., dissenting) (*reprinted in* Appendix to Petition at a-50). As the City's own

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court's denial of a motion to suppress evidence in a criminal case. The rule in *Wilson* offers no support for *Stephens*.

[3] The statement is not reprinted in the City's Appendix, but appears in the Appendix to Reply at a-3.

excerpts of record demonstrate, Kreisner then urged the court of appeals to remand for trial after it appeared the panel was moved by the City's representation. *See* Appendix to Opposition at A-5.

CONCLUSION

There is no reasoned justification for the tortured procedure in this case. Far from refuting Kreisner's contentions, the City's arguments forcefully illustrate two reasons to grant the writ: the court of appeals' decision conflicts with established summary judgment law, and the court of appeals' decision, if unchecked, could wreak havoc with regard to established summary judgment law and standards for appeals and remands. For the foregoing reasons and for the reasons set forth in the Petition, the Court should grant the writ.

Dated: December 13, 1993

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APPENDIX

EXCERPTS OF TRANSCRIPT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD T. KREISNER,
Plaintiff,

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 90-55354

DC No. CV-88-1993-WBE

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS
BEFORE: BOOCHEVER, KOZINSKI, and
O'SCANNLAIN, Circuit Judges

Pasadena, California
April 3, 1991 9:00 a.m.

* * *

THE COURT: But what does the, you know, it permeates your brief, but, reference to the history of this practice, ah, and the City takes umbrage at that, or at least issue with it.

And, how much, they say, look, the past is gone, you know, why bring it up.

What, what can we make of the fact that, that obviously this has a genesis in, um, joint action or actually it was action of the City. What do we make of that, if anything?

MR. JACOBS: I think you make a couple of things of it.

First of all, from the, from our standpoint, you make of it that the City, in order to insulate itself from establishment

clause challenge has to be very, very careful. And very, very sensitive to establishment clause concerns in order to immunize itself.

Given the past history, and given the common understanding that this was a co-sponsored event, the City may have to do, I think, we believe the City has to do a little bit more than it might have to do otherwise in order to overcome the impression of the appearance of endorsement.

There are a couple [of] things you can't make of it.

You can't make of it that this is a long-standing historical practice, and therefore immunized.

Those long-standing, the long-standing historical practice has time and time again been rebuffed in the context of sectarian, sectarian displays.

It obviously matters in the context of what the courts call ceremonial deism, in God we trust and God save this honorable court.

THE COURT: It's the *Marsh* case—

MR. JACOBS: That's exactly—legislative prayer.

The history matters there. The history insulates that kind of government-ese, that kind of speech from, or helps insulate it. It's not determinative. It helps insulate it from establishment clause challenge.

But the history of sectarian displays is, in the view of the precedent, largely irrelevant. The fact that the City was looking back, perhaps, retrospectively, it was in violation doesn't help the City. It may not terribly much hurt it. But it certainly doesn't help the City.

But it also leads in to the, to, to a, it ought to affect how you view the record.

The history matters because we think what's going on here is favoritism. It's not non-discrimination in favor of all, all sects or non-sects. It's not a true effort to create—

THE COURT: This is a factual issue, if anything.

Are you, you're claiming you want to go back for trial on that?

MR. JACOBS: No. I think you can decide this case without sending us back to, to trial.

But I think you can—

THE COURT: Can we? I mean, can we draw those kind of inferences? I mean, ah, on what is here?

MR. JACOBS: I think you know from the record that nothing in the, that nothing supports the City's contention—I think the City has the burden of coming forward on this—nothing supports the City's contention that it acts out of generalized, non-discriminatory free speech concerns.

There's no, the City doesn't point to a policy, opening up the floor to general uses. Ah ha, we discovered there's a new kind of user out there, ah, unattended displays, we really like unattended displays, let's promulgate a policy. They didn't do that.

What they did was, in the, in the face of a, of a public outcry and reversal of the City opinion, the City attorney's opinion, they came up with a pretext for continuing the presence of the display.

And I think you can draw those inferences from the record.

THE COURT: When you talk about pretext, is that quintessentially a factual determination?

Just as like, isn't it factual determination whether or not they would or can or do grant permits to other artists?

MR. JACOBS: I, as I read Lynch for example? Or, or Allegheny? I think you can draw purpose, you can draw purpose inferences. This court can draw purpose inferences on the basis of the religious content of the display and the fact that before it was co-sponsored and now it's not co-sponsored formally.

And that the City has created a special exemption. There's no dispute about that in the record.

There's no dispute that the—the City can't point to a policy, or even an actual permit that's been issued here, consistent with policy.

And, nor can you look at that display in that context. In that organ pavilion. And conclude that it's a non-exclusive use.

As the question, as the discussion earlier pointed out, it's not non-exclusive as to the space it occupies.

* * *